TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1914

No. [redacted] 67

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF ALEXANDER BRYANT COMPANY, PLAINTIFF IN ERROR,

vs.

NEW YORK STEAM FITTING COMPANY AND THE TITLE GUARANTY & SURETY COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 18, 1912.

(23,424)

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SUPREME COURT OF THE UNITED STATES.

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NEW YORK STEAM FITTING COMPANY AND THE TITLE GUARANTY & SURETY COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 *Petition for Writ of Error.*

United States District Court for the Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & SURETY COMPANY, Defendants.

And now comes Alexander Bryant Company, the plaintiff herein, and says that on the 20th day of April, 1912, this Court entered judgment herein in favor of the defendants, and against the plaintiff, in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

GEORGE B. CLASS,
Attorney for Plaintiff Alexander Bryant Company.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Oct. 19, 1912.

2 *Order Allowing Writ of Error.*

United States District Court for the Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & SURETY COMPANY, Defendants.

On this 17th day of October, 1912, came the plaintiff, by its attorney, and filed herein and presented to the Court its petition, praying for the allowance of a writ of error, an assignment of errors intended to be urged by them, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error, upon the plaintiff giving bond according to law, in the sum of Two

hundred and fifty ($250.) Dollars, which shall operate as a supersedeas bond.

LEARNED HAND, *D. J.*

3 UNITED STATES OF AMERICA, *ss:*

[Seal District Court of the United States, Southern District of N. Y.]

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the United States District Court for the Southern District of New York, before you, or some of you, between United States of America for the use and benefit of Alexander Bryant Company, plaintiff, and New York Steam Fitting Company and The Title Guaranty & Surety Company, defendants, a manifest error hath happened to the great damage of the said Alexander Bryant Company, as is said and appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the Supreme Court of the United States, at the City of Washington, D. C., together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 15th day of Novr. 1912, that the record and proceedings aforesaid being inspected, the said Judges of the Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 17th day of October, in the year of our Lord, one thousand nine hundred and twelve, and of the Independence of the United States, the one hundred and thirty-seventh.

ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United
4 *States for the Southern District of New York.*

The foregoing writ is hereby allowed:

LEARNED HAND,
United States District Judge.

A. G., JR.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the United States District Court for the Southern District of New York, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify,

that the pages numbered from one to 196, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of United States of America, for the use and benefit of Alexander Bryant Company, Plaintiff-in-Error, against New York Steam Fitting Company and The Title Guaranty & Surety Company, Defendants-in-Error, as the same remain of record and on file in said office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 14th day of November, in the year of our Lord one thousand nine hundred and twelve and of the Independence of the United States, the one hundred and thirty-seventh.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, Jr., *Clerk*.

5 [Endorsed:] Law 3—76. (1912.) United States District Court for the Southern District of New York. United States of America for the use and benefit of Alexander Bryant Company, Plaintiff in Error, against New York Steam Fitting Company and The Title Guaranty & Surety Company, Defendants in Error. 10. Writ of Error. George B. Class, Attorney for Plaintiff in Error, 156 Fifth Avenue, Manhattan Borough, New York. U. S. District Court, S. D. of N. Y. Oct. 19, 1912. — M. Law 3—76.

6 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY AND TRUST COMPANY OF SCRANTON, PENNA., Defts.

To the above-named defendant-:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan in the City of New York, this 2nd day of November, in the year one thousand nine hundred and eight.

[L. S.] JOHN A. SHIELDS, *Clerk*.

GEORGE B. CLASS,
Plaintiff's Attorney.

Office and Post Office Address 156 5th Av-. Borough of Manhattan, New York City.

7 [Endorsed:] United States Circuit Court, Southern District of New York. United States of America for the use and benefit of Alexander Bryant Company, vs. New York Steam Fitting Company and The Title Guaranty & Trust Co. of Scranton, Penna., Defts. Summons. Geo. B. Class, Plaintiff's Attorney.

To the Defendant- within named:

Take notice, That upon default judgment will be taken for the sum of $5,620.50/100 Dollars, in money, with interest from the 22nd day of Sept. 1908, besides costs.

GEO. B. CLASS,
Plaintiff's Attorney.

156 5th Ave., N. Y. City, N. Y., Manhattan Boro.

8 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & SURETY COMPANY, Defendants.

The United States of America plaintiff in this suit, by George B. Class, their attorney in and for the Southern District of New York, for the use of Alexander Bryant Company, a corporation duly organized and existing under the laws of the State of New York, and a citizen of said State; as and for an amended complaint against the said New York Steam Fitting Company, a corporation duly organized and existing under the laws of the State of New Jersey, and having executive offices in the City of New York and The Title Guaranty & Surety Company, a corporation organized under the laws of the State of Pennsylvania, and having offices in the City of New York, in the Southern District of New York, upon information and belief, respectfully shows:

I. That at all the times hereinafter mentioned the plaintiff for whose benefit this action is primarily brought to wit: the aforesaid Alexander Bryant Company, was and still is a domestic corporation organized and existing under and by virtue of the laws of the State of New York.

II. That at all the times hereinafter mentioned, the defendant, New York Steam Fitting Company was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey.

9 III. That at all the times hereinafter mentioned and prior to, on or about the 12th day of January, 1906, The Title Guaranty & Trust Company of Scranton, Penna., was a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, and that on or about the aforesaid 12th day of January, 1906, the corporation name of said Com-

pany was duly changed to The Title Guaranty & Surety Company, which has ever since been its name.

IV. That on the 15th day of March, 1909, by virtue of an order of Mr. Justice E. Henry Lacombe, of this Court, duly entered and filed herein on said last mentioned day, the name of the defendant, The Title Guaranty & Trust Company of Scranton, Penna., which appeared in the title to the original complaint herein (of which this complaint is the amendment) was ordered changed in said complaint so as to read "The Title Guaranty & Surety Company."

V. That the matter in dispute in this action exceeds exclusive of interest and costs the sum of Two thousand five hundred ($2,500.) Dollars.

VI. That on or about the 12th day of July, 1905, the defendant, New York Steam Fitting Co., entered into a contract in writing with L. M. Shaw, Secretary of the Treasury, for and in behalf of the United States of America, for the mechanical equipment of the New York Custom House, at New York, N. Y., including boiler plant, steam piping and direct radiation, heating and ventilating, plumbing and electric wiring, conduit, switch board, etcetera, a copy of which contract is hereto annexed and marked "Exhibit A" and forms part of this complaint.

VII. That for the faithful performance of said contract, the said New York Steam Fitting Company, as principal, and the said The Title Guaranty & Surety Company (formerly The Title Guaranty & Trust Company of Scranton, Penna.) as surety, on or about July 20th, 1905, executed a bond to the United States of America, conditioned that the defendant, New York Steam Fitting Company, would, among other things, promptly make payment to all persons supplying it labor and material in the prosecution of the work contemplated by said contract a copy of which bond is hereto annexed and marked "Exhibit B," and forms a part of this complaint.

That said bond was accepted by the United States of America, upon which acceptance said contract was awarded to the defendant, New York Steam Fitting Company.

VIII. That the defendant, New York Steam Fitting Company entered upon the performance of said contract and on or about February 19th, 1908, duly completed the same and furnished all of the material and performed all of the labor required to be furnished and performed according to said contract.

IX. That the United States of America ratified each and every departure from the contract between the United States of America and the defendant New York Steam Fitting Company, that occurred, if any, and waived any claim that existed, or might exist, by reason of any variation between the specifications, and plans, and contract, and the work and material actually performed and furnished by the defendant, New York Steam Fitting Company, if any, and that if there was any omission on the part of the defendant, New York Steam Fitting Company, or any material or labor called for under said contract and specifications, which said defendant, New York Steam Fitting Company failed to furnish and perform, the same were omitted by inadvertence.

X. That thereafter and on or about the 9th day of August, 1905, the aforesaid Alexander Bryant Company (for whose benefit this action is primarily brought) entered into an agreement in writing wherein and whereby the said Alexander Bryant Company, agreed to provide all the materials and perform all the work men-
11 tioned in the specifications as shown on the drawings prepared by the architect of the building for the plumbing work complete for the United States Custom House building at New York City, N. Y., in strict accordance with the plans and specifications, and as per proposal of the aforesaid Alexander Bryant Company, dated August 9th, 1905, and the acceptance thereof by New York Steam Fitting Company, dated August 9th, 1905, a copy of which proposal and acceptance was attached to and made a part of said agreement, which work the said Alexander Bryant Company agreed to complete on or before July 1st, 1906, and wherein and whereby the defendant, New York Steam Fitting Company agreed to pay Alexander Bryant Company the sum of Forty-nine thousand ($49,000.) Dollars subject to additions and deductions provided for under said contract and wherein it was further provided that the defendant, New York Steam Fitting Company should make payments to Alexander Bryant Company in current funds in instalments as follows: 85% of the value of the work completed not oftener than once a month and the balance and final payment of 15% to be reserved until the final inspection and completion of the entire work included in said contract, the original of which contract will be produced upon the trial of this action and to which original contract the Alexander Bryant Company beg leave to refer.

That the aforesaid contract and the plans and specifications upon which the same was prepared were amended, abridged, and enlarged, orally and in writing, and an allowance of Twenty ($20) Dollars was allowed March 5th, 1906, from the original contract price for work omitted from original contract, and various estimates for additional work were made, accepted, and the work fully performed as
12 appears from the statement of account hereto attached and marked "Exhibit C," and forming a part of this complaint.

XI. That thereafter the said Alexander Bryant Company proceeded with the performance of the work and the furnishing of the materials under said contract and prior to the 1st day of May 1908, had furnished all the materials and performed all the labor under said contract as hereinbefore set forth and had performed all the conditions of said contract on its part to be performed and had on or before said date completed the same inclusive of all additional work and material ordered as per "Exhibit C", except that all the material was not delivered and all of the labor was not performed by July 1st, 1906, for the reason that the building was not ready to receive the work of said Alexander Bryant Company and that as soon as said Alexander Bryant Company was able to proceed with its said contract it did proceed with all reasonable speed to complete said contract and did complete the same within a fair and reasonable time thereafter and that the defendant, New York Steam Fitting Company accepted the work and materials performed and

furnished by the said Alexander Bryant Company and that the provisions of said contract requiring same to be completed on or before the 1st day of July, 1906, were waived by said New York Steam Fitting Company.

XII. That between on or about the 1st day of March 1906 and on or about the 15th day of April, 1908, the said Alexander Bryant Company, at the special instance and request of the New York Steam Fitting Company, furnished certain extra material and performed certain extra labor of the reasonable price and value of Three thousand four hundred thirty-four and 18/100 ($3,434.18) Dollars, which sum the defendant, New York Steam Fitting Company promised and agreed to pay therefor (vide Exhibit C).

XIII. That the total amount due to the said Alexander
13 Bryant Company under said contract and for extra labor and materials performed and furnished, as aforesaid, is the sum of Fifty-two thousand, four hundred fourteen and 18/100 ($52,414.18) Dollars, no part of which has been paid except the sum of Forty-six thousand nine hundred eighty-three and 00/100 ($46,983.00) — leaving a balance due and owing from the defendant, New York Steam Fitting Company to the said Alexander Bryant Company of Five thousand four hundred thirty-one and 18/100 ($5,431.18) Dollars for labor and material used in construction of the said public building and work, and that said New York Steam Fitting Company failed to promptly make payment to said Alexander Bryant Company, the corporation supplying material and labor in the prosecution of the work provided for in said contract between the New York Steam Fitting Company and the United States of America. That under the agreement between them payment should have been made by the New York Steam Fitting Company to the Alexander Bryant Company as the Government paid the former. That as the final payment was made by the Government to New York Steam Fitting Company, February 15th, 1908, interest on this balance of Five thousand four hundred thirty-one and 18/100 ($5,431.18) Dollars is demanded of the aforesaid New York Steam Fitting Company, and interest is likewise demanded upon the items of $233.46 and $327.50 respectively from May 1st, 1908 and September 22nd, 1908, all of which interest, calculated up to and including September 22nd, 1908 aggregates $189.32.

XIV. That all of said material and all of said labor furnished and performed by the said Alexander Bryant Company for said defendant New York Steam Fitting Company were furnished and performed for the erection and construction of the said public building and for the prosecution of said public work and were furnished for and used in the erection and construction of said public
14 building upon Government property and located in the Borough of Manhattan, City of New York.

XV. That the said New York Steam Fitting Company ratified each and every departure from the contract between the New York Steam Fitting Company and Alexander Bryant Company that occurred, if any, and waived any claim that existed or might exist by reason of any variance between the specifications and plans and

contract and the work and material actually performed and furnished by Alexander Bryant Company, if any, and that if there were any omission on the part of the Alexander Bryant Company or any material or labor called for under said contract and specifications which said Company failed to furnish and perform, the same were omitted by inadvertence.

XVI. That no action or suit has been brought by the United States of America against the defendant within six months after nor had one year elapsed since the performance and final settlement of the contract by the defendant, New York Steam Fitting Company, prior to the commencement of this action.

XVII. That pursuant *of t*he requirements of the Act of Congress of April 13th, 1894 (28 St. 278) as amended by the Act of Congress of February 24th, 1905, (33 St. 811) under and by virtue of which this action is brought, the aforesaid Alexander Bryant Company served personal notice of the pendency of this action upon all known creditors informing them of their right to intervene as the Court might order, and in addition thereto the aforesaid Alexander Bryant Company published said notice in a newspaper of general circulation in the City, County and State of New York, for three successive weeks, the last publication of which was three months before the time limited therefor as in said acts of Congress provided.

XVIII. That the said Alexander Bryant Company has
15 duly demanded of the defendant, New York Steam Fitting Company, the payment of the balance of said sum of Five thousand four hundred thirty-one and 18/100 ($5,431.18) dollars, and interest to September 22nd, 1908, $189.32, aggregating Five thousand six hundred twenty and 50/100 ($5,620.50) dollars with interest from September 22nd, 1908, but said defendant has refused and neglected to pay Alexander Bryant Company the same or any part thereof, of which said Alexander Bryant Company gave repeated notice to the defendant, The Title Guaranty & Surety Company (formerly The Title Guaranty & Trust Company of Scranton, Penna.) and demanded payment from the said The Title Guaranty & Surety Company (formerly The Title Guaranty & Trust Company of Scranton, Penna.) of said sum of Five thousand six hundred twenty and 50/100 ($5,620.50) dollars, with interest thereupon from September 22nd, 1908, for the materials furnished and labor performed for the defendant, New York Steam Fitting Company by Alexander Bryant Company, under said contract, and also for extra labor and extra materials, according to the terms and conditions of said bond, and said Company has refused and neglected to pay the same and said sum has not been paid nor any part thereof.

Wherefore Alexander Bryant Company demands judgment against the defendants for the sum of Five thousand six hundred twenty and 50/100 ($5,620.50) Dollars, with interest thereupon from September 22nd, 1908, together with the costs and disbursements of this action.

GEORGE B. CLASS,
Attorney for Plaintiff.

Office and Post Office Address 156 Fifth Avenue, Borough of Manhattan, N. Y. City, N. Y.

STATE OF NEW YORK,
County of New York, ss:

John B. Ackerson being duly sworn deposes and says: That he is the Treasurer of Alexander Bryant Company for whose bene-
16 fit this action is primarily brought in the name of the United States of America; that he has read the foregoing amended complaint of Alexander Bryant Company and knows the contents thereof: that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the reason why this verification is made by deponent and not by Alexander Bryant Company is, that Alexander Bryant Company is a domestic corporation, and deponent is an officer thereof, viz: the Treasurer: that the source of his information and the grounds for his belief are as follows: information obtained from the persons who superintended and who performed the work and supplied the material; and from information obtained from the books and papers of the Alexander Bryant Company.

JOHN B. ACKERSON.

Sworn to before me this 16th day of March, 1909.
[SEAL.]

I. D. MORRISON,
Notary Public, No. 240, New York Co.

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EXHIBIT A.

Contract Between the United States of America and the New York Steam Fitting Co.

Whereas, By advertisement, duly made and published according to law, proposals were asked for furnishing all of the labor and materials for the work herein provided for; and

Whereas, The proposal of the New York Steam Fitting Co. furnished in response thereto, was duly accepted, as hereinafter stated, on condition that it execute a contract in accordance with the terms of said bid.

Now, therefore, this agreement, made and entered into by and between L. M. Shaw, Secretary of the Treasury, for and in behalf of the United States of America, of the first part, and the New York Steam Fitting Co., a corporation organized under the laws of the State of New Jersey and having executive offices in New York, N. Y., of the second part,

Witnesseth: That the party of the second part for the consideration hereinafter mentioned, covenants and agrees to and with the party of the first part to furnish all of the labor and materials and do and perform all the work required for the mechanical equipment for the new Custom house in New York, N. Y., including boiler plant, steam piping and direct radiation, heating and ventilation, plumbing, and electrical wiring, conduits, switch-boards, etc.; but

substituting (for the Hawley down draft furnaces specified) grates suitable for burning anthracite coal of the smaller sizes and cheaper grades; such grates to be subject to the approval of said party of the first part; in strict and full accordance with the requirements of drawing, numbered 610 to 614 inclusive, and 666 to 680, inclusive; and such other detail drawings as may be furnished to the
18 party of the second part by the Architect of the building or by the Supervising Architect of the United States Treasury Department; the advertisement for proposals, dated March 9, 1905; the specification for the work; the proposal dated May 17, 1905, addressed to the said Supervising Architect by the said party of the second part; and letter dated July 11, 1905, addressed to the said party of the second part by J. B. Reynolds, Assistant Secretary of the Treasury, accepting said proposal; the 4 addenda (dated April 14 and 29, and May 4 and 5, 1905, respectively) to said specification; and the 2 letters addressed May 18 and June 8, 1905 (the former to the Supervising Architect and the latter to the Architect of said building) by said party of the second part, supplementing said proposal; and the telegram and letter addressed July 5, 1905, to said Supervising Architect by said party of the second part, respecting the time for completion of certain items of said work; a true and correct copy of each of which said papers is attached hereto and forms a part of this contract; and which said numbered drawings, bearing the signature of the said Supervising Architect and the signature of the said party of the second part, are on file in the Office of the Supervising Architect of the United States Treasury Department, and are hereby made part of this contract.

And the said party of the second part further covenants and agrees that the work herein agreed to be performed shall be commenced promptly upon receipt of notice of the approval of the bond hereto attached, and that the same shall be carried on in such order and at such times and seasons, and with such force as shall from time to time be directed or prescribed by the Architect of the building or by the Supervising Architect or his representative, and that the same shall be completed in all its parts within the periods prescribed by said letter of acceptance dated July 11, 1905;
19 that all materials used shall be of the very best quality of their respective kinds; that all the work performed shall be executed in the most skillful and workmanlike manner, and that both the materials used and the work performed shall be in every respect to the entire and complete satisfaction of the Architect of the building, subject to the approval of the Supervising Architect.

And the said party of the second part expressly covenants and agrees that the bond hereto attached shall be security, also, for the satisfactory performance and fulfillment of all the guarantees set forth in or required by said specification.

It is expressly covenanted and agreed by and between the parties hereto that time is and shall be considered as of the essence of the contract on the part of the party of the second part, and in the event that the said party of the second part shall fail in the due performance of the entire work to be performed under this contract,

by and at the time herein mentioned or referred to, the said party of the second part shall pay unto the party of the first part, as and for liquidated damages, and not as a penalty, the sum of four hundred twenty dollars, for each and every day the said party of the second part shall be in default, which said sum of four hundred twenty dollars per day, in view of the difficulty of estimating such damages with exactness, is hereby expressly fixed, estimated, computed, determined, and agreed upon as the damages which will be suffered by the party of the first part by reason of such default, and it is understood and agreed by the parties to this contract that the liquidated damages hereinbefore mentioned are in lieu of the actual damages arising from such breach of this contract; which said sum the said party of the first part shall have the right to deduct from any moneys in its hands otherwise due, or to become due, to the said party of the second part, or to sue for and recover compensation or damages for the nonperformance of this contract at the time or times herein stipulated or provided for.

The party of the second part further covenants and agrees to hold and save the United States, its officers, agents, servants, and employees, harmless from and against all and every demand, or demands, of any nature or kind, for, or on account of, the use of any patented invention, article, or appliance, included in the materials hereby agreed to be furnished under this contract.

It is further covenanted and agreed by and between the parties hereto that the said party of the second part will, without expense to the United States, comply with all the municipal building ordinances and regulations, in so far as the same are binding upon the United States, and obtain all required licenses and permits, and be responsible for all damages to person or property which may occur in connection with the prosecution of the work; that all work called for by the drawings and specifications, though every item be not particularly shown on the first or mentioned in the second, shall be executed and performed as though such work were particularly shown and mentioned in each, respectively, unless otherwise specifically provided; that all materials and work furnished shall be to the satisfaction of the Architect of the building, subject to the approval of the said Supervising Architect; and that said party of the second part shall be responsible for the proper care and protection of all materials delivered and work performed by said party of the second part until the completion and final acceptance of same.

It is further covenanted and agreed by and between the parties hereto that the said party of the second part will make any omissions from, additions to, or changes in, the work or materials herein provided for whenever required by said party of the first part; the valuation of such work and materials to be determined on the basis of the contract unit of value of material and work referred to; or, in the absence of such unit of value, on prevailing market rates; which market rates, in case of dispute, are to be determined by the said Supervising Architect, whose decision with reference thereto shall be binding upon both parties; and that

no claim for damages, on account of such changes or for anticipated profits, shall be made or allowed.

It is further covenanted and agreed that no claim for compensation for any extra materials or work is to be made or allowed, unless the same be specifically agre*d*d upon in writing or directed in writing by the party of the first part; and that no addition to, omission from, or changes in the work or materials herein specifically provided for shall make void or affect the other provisions or covenants of this contract, but the difference in the cost thereby occasioned, as the case may be, shall be added to or deducted from the amount of the contract; and, in the absence of an express agreement or provision to the contrary, no addition to, or omission from, or changes in the work or materials herein specifically provided for shall be construed to extend the time fixed herein for the final completion of the work.

It is further covenanted and agreed by and between the parties hereto that all materials furnished and work done under this contract shall be subject to the inspection of the Architect of the building, the Supervising Architect, the Superintendent of the building, and of other inspectors appointed by the said party of the first part, with the right to reject any and all work or material not in accordance with this contract; and the decision of the architect of
22 the building, when approved by the said Supervising Architect as to quality and quantity shall be final. And it is further covenanted and agreed by and between the parties hereto that said party of the second part will without expense to the United States, within a reasonable time to be specified by the Architect of the building, or by the Supervising Architect, remedy or remove any defective or unsatisfactory material or work; and that, in the event of the failure of the party of the second part immediately to proceed and faithfully continue so to do, said party of the first part may have the same done and charge the cost thereof to the account of said party of the second part.

It is further covenanted and agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of this contract.

It is further covenanted and agreed that the party of the first part shall have the right to require that any particular portion of the work herein provided for shall be completed within such time as may be hereafter definitely specified by the said party of the first part in written notice to the said party of the second part; and that should the said party of the second part fail to complete such particular portion of the work within the time so specified, or fail to complete the entire work contemplated by this contract within the time or times herein stipulated or provided for; or fail to prosecute said work with such diligence as in the judgment of the party of the first part will insure the completion of the said work within the time hereinbefore provided, the said party of the first part may
23 withhold all payments for work in place until final completion and acceptance of same, and is authorized and em-

powered, after eight *eight* days' due notice thereof in writing, served personally upon or left at the shop, office, or usual place of abode, or with the agent, of the said party of the second part, and the said party of the second part having failed to take such action within the said eight days as will, in the judgment of the said party of the first part, remedy the default for which said notice was given, to take possession of the said work in whole or in part and of all machinery and tools employed thereon and all materials belonging to the said party of the second part delivered on the site, and, at the expense of the said party of the second part, to complete or have completed the said work, and to supply or have supplied the labor, materials and tools, of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part; in which event the said party of the second part shall be further liable for any damage incurred through such default and any and all other breaches of this contract.

It is further covenanted and agreed that the said party of the first part shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever, in the opinion of the architect of the building or of the Supervising Architect, it may be necessary for the purposes or advantage of the work, and upon such occasion or occasions the said party of the second part shall, without expense to the United States, properly cover over, secure, and protect such of the work as may be liable to sustain injury from the weather, or otherwise; provided that for all such suspensions and other delays caused by the said party of the first part the party of the
24 second part shall be allowed one day additional to the time herein stated, for each and every day of such delay so caused, in the completion of the contract, the same to be ascertained by the Supervising Architect; provided, that no claim shall be made or allowed to the said party of the second part for any damages which may arise out of any delay caused by the said party of the first part.

And the said party of the first part, acting for and in behalf of the United States, covenants and agrees to pay, or cause to be paid, unto the said party of the second part, or to the heirs, executors administrators, or successors of the said party of the second part, in lawful money of the United States in consideration of the herein recited covenants and agreements made by the party of the second part, the sum of Two hundred thirty thousand six hundred sixty-six (230,666.) dollars; such payment to be made as prescribed on page four of said specification and all the retained percentages of such price shall be forfeited by said party of the second part in the event of the nonfulfillment of this contract; it being expressly covenanted and agreed that said forfeiture shall not relieve the party of the second part from liability *fo* the party of the first part for any and all damages sustained by reason of any breach of this contract; p*r*ovided, however, that no payment hereunder shall be due to the said party of the second part until every part of the work to the point of advancement reached—on account of which payment is claimed—shall be found to be satisfactorily supplied

and executed in every particular and any and all defects therein remedied to the entire satisfaction of the party of the first part.

It is an express condtiion of this contract that no Member of or Delegate to Congress, or other person whose name is not at this time disclosed, shall be admitted to any share in this contract, or to any benefit to arise therefrom; and it is further covenanted and agreed that this contract shall not be assigned.

In witness whereof, The parties hereto have hereunto subscribed their names this 12th day of July A. D. 1905.

The erasures in lines 22 and 24, page 2, and 1, 2, 3 and 4, page 5, and the interlineations in lines 5, 21 and 26, page 2; 15, 32, 34 and 36, page 3; 14, page 4; and 11, page 5, were made before the execution hereof.

L. M. SHAW,
Secretary of the Treasury.
N. Y. STEAM FITTING CO., [SEAL.]
HENRY L. HALL,
President, Contractor.

Witnesses to the signature of the Contractor:
BURTON P. HALL.
ROBERT E. HALL.

We hereby certify that this contract and bond have been correctly prepared and compared:

W. F. FIELD,
Acting Chief of the Law and Records Division.

J. A. W. R.

JAMES C. PLANT,
Chief of the Computing Division.

EXHIBIT B.

Bond.

Know all men by these presents: That We, the New York Steam Fitting Co., a corporation organized under the laws of the State of New Jersey and having executive offices in the City of New York, County of, and State of N. Y., principal, and The Title Guaranty & Trust Company of Scranton, Penna. of the City of Scranton, County of Lackawanna, and State of Pennsylvania, and having an office and place of business at 277 Broadway, New York City, County of, and State of —, surety, are held and firmly bound unto the United States of America in the sum of One hundred fifteen thousand dollars ($115,000.), lawful money of the United States, for the payment of which, well and truly to be made to the United States, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of July, A. D. 1905,

The condition of the above obligation is such, That whereas the New York Steam Fitting Co. has entered into a certain contract, hereto attached, with L. M. Shaw, Secretary of the Treasury, acting for and in behalf of the United States bearing date the 12th day of July A. D. 1905; now if the said New York Steam Fitting Co., shall well and truly fulfill all the covenants and conditions of said contract, and shall perform all the undertakings therein stipulated by it to be performed, and shall well and truly comply with and fulfill the conditions of, and perform all of the work and furnish all the labor and materials required by, any and all changes in or additions to, or omissions from, said contract which may hereafter be made, and shall perform all the undertakings stipulated
27 by it to be performed in any and all such changes in, or additions thereto, notice thereof to the said surety being hereby waived, and shall promptly make payment to all persons supplying it with labor or materials in the prosecution of the work contemplated by said contract, then this obligation to be void; otherwise, to remain in full force and virtue.

In testimony whereof, The said New York Steam Fitting Co., principal, and The Title Guaranty & Trust Company of Scranton, Penna. and ——— ———, surety, have hereunto subscribed their hands and affixed their seals, the day first above written.

N. Y. STEAM FITTING CO. [SEAL.]
HENRY L. HALL, *President.*
THE TITLE GUARANTY & TRUST [SEAL.]
COMPANY OF SCRANTON, PENNA.,
By GEORGE C. CLAUSEN,
Resident Vice-President.

Signed, sealed, and delivered in presence of—
BURTON P. HALL.
ROBERT E. HALL.
GEO. W. YUENGLING.
JOHN P. GLASSON.
JOSEPH STIENER.
GEO. W. KEARNEY.

Attest:
O. WILSON GOTT,
Resident Secretary.

STATE OF NEW YORK,
County of New York, ss:

Personally appeared before me, George C. Clausen, on this 20th day of July, one thousand nine hundred and five, known to me to be the Resident Vice President of the The Title Guaranty & Trust Company of Scranton, Penna. the corporation described in and which executed the annexed bond of the New York Steam Fitting Co., as surety thereon, and who, being by me duly sworn, deposes and says that he resides at The City of New York in the State of

New York; that he is the Resident Vice President of the said The Title Guaranty & Trust Company of Scranton, Penna., *Company* and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Pennsylvania; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894, allowing certain cor-
28 porations to be accepted as surety on bonds; that the seal affixed to the annexed bond of the New York Steam Fitting Co. is the corporate seal of the said The Title Guaranty & Trust Company of Scranton, Penna., *Company*, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Resident Vice President of said Company; and that he is acquainted with O. Wilson Gott and knows him to be the resident Secretary of said Company; and that the signature of said O. Wilson Gott subscribed to said bond is in the genuine hand writing of said O. Wilson Gott, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts, and liabilities, of every nature whatsoever, by more than the sum of Seven hundred and fifty thousand dollars ($750,000.).

Deponent further says that O. Wilson Gott, residing at the City of New York, in the State of New York, has been duly appointed as the agent of said Company to accept service of process against said Company in the Southern Judicial District of New York and is authorized to enter an appearance in behalf of said Company in any action, suit, or proceeding brought against it in said judicial district.

GEORGE C. CLAUSEN,
Resident Vice-President.

Sworn to, acknowledged before me, and subscribed in my presence this 20th day of July, 1905.

GEO. W. YUENGLING, [SEAL.]
Commissioner of Deeds,
the City of New York.

29

EXHIBIT "C."

NEW YORK, *May* 1, 1908.

New York Steam Fitting Company to Alexander Bryant Co., Plumbing, Water & Steam Heating, Dr.

261 West 25th Street.

Telephone call 5143-5144 Chelsea.

U. S. Custom House.

Statement.

Plumbing as per contract	49,000 00	
Allowance March 5th 1906	20 00	
		48,980 00

To modifications and additions executed upon the order of the New York Steam Fitting Company and accepted by them as follows:

Estimate of Jul- 30/06		327 00
" " Aug. 7/06		143 00
" " " 31/06		117 00
" " Oct. 24/06		127 75
" " Nov. 28/06		120 00
" " Jan. 9/07		210 75
" " May 3/07		83 85
" " " 22/07		90 00
" " Sept. 11/07		365 00
" " Dec. 13/07		67 50
May 1/07—Bill rendered		117 32
Jun- 1/07— " "		980 00
Oct. 1/07— " "		124 05
Mar. 10/08— " "		233 46
Apr. 11/08— " "		327 50
		52,414 18
Received onaccount up to July 1/07	32,183.00	
" " " Jul- 18/07	1,800.00	
" " " Oct. 19/07	3,000.00	
" " " Feb. 25/08	10,000.00	
		46,983.00
Balance		5,431.18

30 Brought forward..... 5,431.18

Interest on the foregoing is calculated as follows:

Interest on item of $233.46, and				
" " " " $327.50				
	$560.96,	from 5/1/08		
		to 9/22/08	$13.18	
Interest on....	$4,870.22,	from 2/15/08		
		to 9/22/08	=$176.14	
Total interest on $5,431.18			$189.32	189.32

Interest on $4,870.22 is added from Feb. 15/08, as this is the date as of which the government made its final payment to the defendant New York Steam Fitting Company.

Total indebtedness as of 9/22/08..... $5,620.50

31 *Bill of Particulars.*

United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA (for the Use and Benefit of ALEXANDER BRYANT COMPANY), Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & SURETY COMPANY, Defendants.

The plaintiff as and for a Bill of Particulars, demanded by The Title Guaranty & Surety Company herein, avers:

That pursuant of the requirements of the Acts of Congress under which this action is brought, the plaintiff herein made personal service of Notice of the Pendency of this action upon all known creditors of the New York Steam Fitting Company, as follows:—

On Messrs. Peet and Powers, November 21st, 1908, on Hermann & Grace, November 21st, 1908, on Henry R. Worthington, November 19th, 1908, on John Simmons Company, November 20th, 1908, on Cutler Hammer Company November 19th, 1908, on Rob't A. Keasbey Co., November 20th, 1908.

That under date of November 21st, 1908, Messrs. Hardy & Shellabarger, attorneys for New York Steam Fitting Company and The Title Guaranty & Trust Company of Scranton, Penna. (now The Title Guaranty & Surety Company) stipulated with the attorney for the plaintiff as follows:—

"It is hereby consented on the part of the defendants that defendants waive any failure on the part of the plaintiff to notify creditors under the third proviso of the Statute, provided no more such notices are sent."

32 That on the 5th day of November, 1908, and on each day thereafter to and including November 25th, 1908, there was published in the New York Press of New York City, New York, a notice of the pendency of this action, addressed to all known creditors of the defendant, the New York Steam Fitting Company.

Attached hereto and forming a part of this Bill of Particulars is a copy of the form in which personal notice of the pendency of this action was served upon all known creditors of the New York Steam Fitting Company, and a copy of the notice which was given by publication in the New York Press to aforesaid creditors.

Dated, New York, December 7th, 1909.

GEORGE B. CLASS,
Attorney for Plaintiff.

156 Fifth Avenue, Borough of Manhattan, N. Y. City, N. Y.

STATE OF NEW YORK,
County of New York, ss:

George B. Class being duly sworn deposes and says:

That he is the attorney for the plaintiff in the above entitled action: that he has read the foregoing Bill of Particulars and knows the contents thereof: that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true: that the reason why this Bill of Particulars is not verified by the plaintiff herein is because the facts herein recited are within the personal knowledge of deponent who is the attorney for the plaintiff herein.

GEO. B. CLASS.

Sworn to before me this seventh day of November, 1909.

[SEAL.]

I. D. MORRISON,
Notary Public No. 132, New York Co.

33 Circuit Court of the United States, Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,

against

NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & TRUST COMPANY OF SCRANTON, PENNA., Defendants.

Please take notice that the above named Alexander Bryant Company, has commenced an action in the name of the United States of America under the provisions of the Act of Congress of August 13th, 1894 (as amended by Act of Congress of Feb. 24th, 1905) to recover a judgment against the defendant New York Steam Fitting Company and its surety the Title Guaranty & Trust Company of Scranton, Penna., for a sum of money alleged to be due and owing to the aforesaid Alexander Bryant Company for work, labor,

materials and services furnished as sub-contractors under the contract and bond entered into by the New York Steam Fitting Company for the mechanical equipment of the new custom house at New York City, New York, in which bond the defendant, The Title Guaranty & Trust Company of Scranton, Penna., is joined as surety.

As required by the express provisions of the aforementioned acts of Congress, and as one of the creditors of the New York Steam Fitting Company, under aforesaid contract, you are hereby notified of your right to intervene and be made an additional party plaintiff in this action, as the Court may order, so as to have the rights and claims of any and all existing creditors under said contract and bond, adjudicated in one and the same action.

Dated, New York, Nov. 2nd, 1908.

GEORGE B. CLASS,
Attorney for Plaintiff.

156 Fifth Avenue, Borough of Manhattan, N. Y. City, N. Y.

To —— ——.

34 Circuit Court of the United States, Southern District of New York.

UNITED STATES OF AMERICA (for the Benefit of ALEXANDER BRYANT COMPANY), Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & TRUST COMPANY of Scranton, Pennsylvania, Defendants.

Pursuant of the requirements of an Act of Congress of August 13th, 1894, and of February 24th, 1905, amendatory thereof, notice is hereby given to all creditors of the above named defendant New York Steam Fitting Company, under the contract between the plaintiff and the said last named defendant (and the co-defendant, as their surety) for work incident to the construction of the Custom House, that the above entitled action has been instituted upon the bond of the defendant-contractor and against said surety, and that any creditor may file his claim in this action and be made a party herein as in said acts of Congress provided.

New York, October 16th, 1908.

GEORGE B. CLASS
Attorney for Plaintiff.

156 Fifth Avenue, Manhattan Borough, New York City, New York.

35 *Answer of Title Guaranty & Surety Company to Amended Complaint.*

United States District Court Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,
against
THE NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & TRUST COMPANY OF SCRANTON, PENNA., Defendants.

To the Honorable Judges of the United States District Court, Southern District of New York:

The Title Guaranty & Surety Company, one of the defendants above named, answering the amended complaint of the plaintiff, by Adrian T. Kiernan, Esq., its attorney, respectfully shows and alleges to the Court, upon information and belief:

First. That it has no knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph of said amended complaint entitled "I" and therefore denies same.

Second. That it has no knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph of said complaint entitled "VI" and therefore denies same, except that it admits that heretofore the defendant, The New York Steam Fitting Company entered into a contract in writing with L. M. Shaw, Secretary of the Treasury, for and on behalf of the United States of America, for certain purposes in said contract specifically set forth, and for greater certainty, this defendant begs leave
36 to refer to the original thereof and to produce the same upon the trial of this action with the same force and effect as if fully and at length set forth herein.

Third. That it has no knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph of said plea entitled "VII" and therefore denies same, except that it admits that for the faithful performance of the contract above set forth the said New York Steam Fitting Company, as principal, and this defendant, as surety, executed a bond to the United States of America conditioned that the defendant, the New York Steam Fitting Company, would among other things, promptly make payment to all persons supplying it with labor and materials in the prosecution of the work contemplated in said contract, and that for greater certainty, this defendant begs leave to produce upon the trial of this action, the original of said bond with the same force and effect as if fully and at length set forth in full herein.

That it admits that the bond as executed by it, was accepted by the United States of America and that said contract was awarded to the New York Steam Fitting Company.

Fourth. That it denies each and every allegation contained in paragraph of said plea entitled "VIII", except that it admits that the New York Steam Fitting Company entered upon the performance of the contract above mentioned and that at or prior to the 15th day of

February, 1908, duly completed the same and furnished all the materials and performed all the labor required to be furnished and performed according to said contract, except such materials and labor as were exempted from the performance thereof.

Fifth. That it has no knowledge or information sufficient
37 to form a belief as to each and every allegation contained in paragraphs of said plea entitled "X", "XI", "XII", "XIII", "XIV" and "XV" and therefore denies same.

Sixth. That it admits that no action or suit was brought by the United States of America against the defendants within six months after the performance and final settlement of the said contract between the New York Steam Fitting Company and the said L. M. Shaw, Secretary of the Treasury.

Seventh. That it has no knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph of the plea entitled "XVII" and "XVIII" and therefore denies same, except that it admits that if it has received certain notices or demands from the said plaintiff, it prays leave for greater certainty, to produce the same on the trial of this action with the same force and effect as if fully set forth herein, and as if the receipt thereof was fully admitted herein. It also admits that it has not paid to the said plaintiff the said sum mentioned in the amended complaint, to wit, Five thousand six hundred and twenty and 50/100 ($5,620.50) dollars, or any part thereof, nor the interest thereon.

The Title Guaranty & Surety Company, further answering the amended complaint herein, respectfully shows and alleges upon information and belief:

Eighth. That it is a corporation duly organized and existing under the laws of the State of Pennsylvania, and was at all the times mentioned in the complaint such corporation.

Ninth. That on or about the 12th day of July,
38 1905, the defendant, the New York Steam Fitting Company entered into a contract in writing with L. M. Shaw, Secretary of the Treasury, for and on behalf of the United States of America for the mechanical equipment of the New York Custom House, in New York, N. Y., and for greater certainty the said The Title Guaranty & Surety Company prays leave to produce the original of said contract upon the trial of this action with the same force and effect as if it was set forth fully and at length herein.

Tenth. That for the faithful performance of said contract, the New York Steam Fitting Company, as principal, and The Title Guaranty & Surety Company (formerly the Title Guaranty & Trust Company of Scranton, Penna.) as surety, executed on or about July 20th, 1905, a bond to the United States of America, conditioned that the defendant, the New York Steam Fitting Company, would, among other things, promptly make payments to all persons supplying it labor and materials in the prosecution of the work contemplated by said contract.

Eleventh. That thereafter the defendant, the New York Steam Fitting Company, entered upon the performance of this said contract and on or before the 15th day of February, 1908, duly completed the same, and final payment therefor was made on the —

day of February, 1908. That the work required to be performed under the contract aforesaid, was duly accepted by the United States of America, or its representatives, on or before the said 15th day of February, 1908.

Twelfth. That under and by virtue of Chapter 778 of the
39 United States Statutes passed February 24th, 1905, it is provided that any person having a claim against a contractor based upon labor and materials supplied, shall have the right of action upon the bond given by such contractor, and is authorized in case no action on said bond is brought by the United States of America within six months from the completion of the contract, to bring suit in the name of the United States in the Circuit Court of the United States in the District in which said contract is being performed, against said contractor and its surety. That for greater certainty, The Title Guaranty & Surety Company begs to refer to the original of said law as principal under authority of law.

Thirteenth. That the United States of America did not begin any action against the said contractor, the New York Steam Fitting Company, or its surety, The Title Guaranty & Surety Company within six months after the completion of the contract above mentioned.

Fourteenth. That the above entitled action was commenced within one year from the completion of the said contract, but was commenced in the name of the "United States of America for the use and benefit of Alexander Bryant Company."

Fifteenth. That The Title Guaranty & Surety Company shows to the Court that the commencement of such action in such name, was unauthorized and not in compliance with the Statute above referred to.

That in and by said Statute it is provided that only one action can be brought and that any creditor may file his claim in said action and made a party thereto within one year from the completion of the work under the contract and not later.

Sixteenth. That in and by said last mentioned law, it is
40 provided that personal notice must be given to all known creditors and in addition thereto, notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed for at least three successive weeks, the said publication to be made three months before the time limited therefor.

Seventeenth. That The Title Guaranty & Surety Company has no knowledge or information sufficient to form a belief as to whether the said Alexander Bryant Company, the plaintiff, ever gave such notice in the manner required by said Statute and therefore denies that such notice was given.

Wherefore The Title Guaranty & Surety Company prays that the amended complaint herein be dismissed with the costs of this action.

ADRIAN T. KIERNAN,
Attorney for Defendant
The Title Guaranty & Surety Co.

Office & Post Office Address, 141 Broadway, Manhattan, New York City.

41 STATE OF NEW YORK,
County of New York, ss:

Fred C. Williams, being duly sworn, says, that he is the Resident Manager of The Title Guaranty & Surety Company (formerly the Title Guaranty & Trust Company of Scranton, Penna.), one of the defendants in the above entitled action. That he has read the foregoing answer and knows the contents thereof and that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

Deponent further says that the reason why this verification is made by deponent and not by the said defendant, is that the defendant is a corporation existing under the Laws of the State of Pennsylvania. That the grounds, upon which the allegations are made, which are stated to be upon information and belief, are general knowledge gained by deponent in the transaction of the business of the said The Title Guaranty & Surety Company, the inspection of papers and statements made by counsel or employee of the said The Title Guaranty & Surety Company.

FRED. C. WILLIAMS.

Sworn to before me this 5th day of May, 1909.

GEO. W. YUENGLING,
Notary Public, N. Y. Co.

42 *Answer of New York Steam Fitting Company to Amended Complaint.*

United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,
vs.
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & SURETY COMPANY, Defendants.

The defendant, New York Steam Fitting Company, answering the amended complaint of the plaintiff, respectfully shows to this Court:

I. It alleges that it has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs I, III, and XVII of the complaint.

II. It admits the allegations contained in Paragraphs II, IV, VI, VII and X of the complaint.

III. It denies that the contract between the United States of America and this defendant was duly completed about February 19th, 1908, as alleged in Paragraph VIII of the complaint and avers that said contract was completed on February 15th, 1908.

43 IV. Denies the allegations contained in Paragraphs XI and XV of the complaint.

V. It alleges that it has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs XII and XVI of the complaint.

VI. It admits as alleged in Paragraph XVIII of the complaint that the sum of Five Thousand four hundred and thirty-one and 18/100 ($5,431.18) Dollars has been demanded of it, but alleges that it has no information sufficient to form a belief as to the other allegations contained in said Paragraph.

Wherefore, the defendant, New York Steam Fitting Company, demands judgment dismissing the complaint herein with costs.

HARDY & SHELLABARGER,
Attorneys for New York Steam Fitting Company.

Office & P. O. Address, 165 Broadway, New York City.

44 STATE OF NEW YORK,
City and County of New York, ss:

Burton P. Hall, being duly sworn, says that he is the Treasurer of New York Steam Fitting Company, one of the defendants in the within entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

That the reason this verification is made by deponent and not by the defendant is that said New York Steam Fitting Company is a corporation and deponent is the Treasurer thereof.

BURTON P. HALL.

Sworn to before me this 5th day of April, 1909.

ROBERT G. JEFFERY,
Notary Public, New York County.

45 At a Stated Term of the United States Circuit Court for the Southern District of New York, held at the Post-Office Building, in the Borough of Manhattan, City of New York, on the 31st Day of March, 1911.

Present: Hon. Charles M. Hough, District Judge.

UNITED STATES OF AMERICA to the Use of ALEXANDER BRYANT COMPANY, Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and Others, Defendants.

The above action having come on for trial in this Court and the same having been thereafter discontinued as to the defendant, Peet & Powers, and the remaining parties to the suit; who appeared in court hereon the use plaintiff, the Title Guaranty & Surety Company, defendant; and Herman & Grace, interveners, having consented, in

open Court, that this cause and the issues herein be referred to some person to be appointed by this Court, now, therefore, it is

Ordered that this cause and all the issues herein be referred to Henry Melville, Esq., counselor at law, having an office at No. 120 Broadway, Manhattan, New York City, to hear and determine same and to report his determination thereon to this Court with all convenient speed; and that upon filing of the report of said referee with the Clerk of this Court, judgment may be entered in conformity therewith as if said cause had been heard before the Court.

C. M. HOUGH.

46 We consent to the making of the within order. Dated March 1, 1911.

GEO. B. CLASS,
Att'y for Plaintiff.
A. T. KIERNAN,
Att'y for Def't Title G. & S. Co.
PHILLIPS & AVERY,
Att'y for Herman & Grace.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Apr. 3, 1911, John A. Shields, Clerk.

47 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,

vs.

NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & TRUST COMPANY OF SCRANTON, PENNSYLVANIA, Defendants.

Before Henry Melville, Esq., Referee.

NEW YORK, *August* 1, 1911.

Appearances:

George B. Class, Attorney for plaintiff.

Adrian T. Kiernan, Attorney for defendant The Title Guaranty & Trust Company of Scranton, Pa.

John J. Donovan, Attorney for defendant New York Steam Fitting Company.

The Referee states that he has taken the oath prescribed by the Statute.

48 It is stipulated by and between counsel for the plaintiff and the defendant The Title Guaranty & Trust Company of Scranton, Pennsylvania, that Adams & Chambers be employed as stenographers on this reference, and that their charges, at the rate of thirty-five cents per folio for the original and two carbon copies thereof, and a charge of Five dollars in case of an adjournment of which three hours' notice has not been given to the stenographers, be paid equally by said plaintiff and the defendant The Title Guar-

anty & Trust Company of Scranton, Pennsylvania, and that such charges shall be a taxable disbursement in the action.

It is further stipulated that the Referee shall not be confined to the statutory charge for services, and that he may charge a reasonable fee for such services, and that the same may be fixed by the Court unless the parties agree upon it.

Mr. KIERNAN: Does your Honor consider the bill of particulars served by the plaintiff to be before the Court?

The REFEREE: I have not read any of these papers yet.

Mr. KIERNAN: I simply ask as a question of law do you
49 consider they are before the Court at this time, if you do I wish to make a motion at this time.

The REFEREE: If you want to stop while I read these pleadings, I will do so.

Mr. CLASS: May I examine a witness, your Honor, so that he may leave?

The REFEREE: Yes.

LEICESTER DE LISSER, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. CLASS:

Q. What is your business, Mr. de Lisser?
A. Newspaper business.
Q. With what newspaper are you connected?
A. The New York Press.
Q. In what capacity?
A. Advertising auditor.
Q. What is your address?
A. 2043 53rd Street, Brooklyn, New York.
Q. Can you say from your knowledge as to whether or not The New York Press inserted any publication in connection with an action in the United States Circuit Court for the Southern District of New York between The United States of America, for the use and benefit of Alexander Bryant Company and the New
50 York Steam Fitting Company and The Title Guaranty & Trust Company?

Mr. KIERNAN: Objected to as incompetent, irrelevant and immaterial.

The REFEREE: I will allow the question.

Exception by Mr. Kiernan.

A. Yes, sir, I can.
Q. Have you a copy of the advertisement that was inserted in your paper?

Mr. KIERNAN: Objected to as leading.

The REFEREE: He has not said there was any advertisement inserted yet, I believe.

Q. Do you attend to the inserting of advertisements?
A. They all go through my hands.

Q. All advertisements of a legal character?
A. All of every kind.
Q. Have you a copy of any advertisement that was inserted in your paper of the description that I have given?
A. I have my original affidavit here.
Q. Is there attached thereto any copy of the advertisement as you published it?
A. Yes, it is attached here.
Q. When was that advertisement published?
A. It ran for 21 successive days, commencing on the 5th day of November, 1908, and ending upon the 25th day of November, 1908.

Q. What charge was made for the inserting of that adver-
51 tisement?

Mr. KIERNAN: Objected to as incompetent, irrelevant and immaterial.
The REFEREE: I will allow it.
Exception by Mr. Kiernan.

A. $65.52.
Q. Was that charge in accordance with the usual rates of the newspaper for publishing such notices?

Mr. KIERNAN: Objected to as incompetent, irrelevant and immaterial.
The REFEREE: I will allow it.
Exception by Mr. Kiernan.

A. It was in accordance with our legal rate, that is, the rates of charge for legal advertisements.

Mr. KIERNAN: I ask that the answer be stricken out. There is no competent proof as to the cost of that publication.
The REFEREE: I will give you the privilege of renewing the motion to strike out. I will deny the motion at the present time. You can make your motion later when I know something more about the case.
Exception by Mr. Kiernan.
Mr. CLASS: I might say, your Honor, the Federal Statutes requires the insertion of such advertisements. The advertisement was inserted, and I introduce the cost thereof as it might be an
52 element in the damages should I succeed.

Q. Mr. de Lisser, is this the affidavit as to the publication which you inserted (handing paper to witness)?
A. It is, sir, yes.

Mr. CLASS: I offer in evidence the affidavit and the copy of the advertisement which is attached thereto.
Mr. KIERNAN: I object to it as incompetent, irrelevant and immaterial.
The REFEREE: All you want to have him answer is that it is a copy of the advertisement, isn't it?

Mr. CLASS: Yes, sir.

The REFEREE: I think there might be a technical objection to it as irrelevant.

Mr. KIERNAN: I object to that piece of paper as incompetent, irrelevant and immaterial.

Q. Mr. de Lisser, do you know whether or not this newspaper clipping which has been offered in evidence is one of the copies that was actually published?

A. It is, sir; it is cut from our regular paper.

Mr. CLASS: I offer in evidence the newspaper clipping only which is attached to this paper.

Mr. KIERNAN: I renew my objection on the same grounds.

The REFEREE: Objection overruled.

Exception by Mr. Kiernan.

53 Mr. KIERNAN: Now I make a further objection on the ground that there is no proof that any such publication was ordered by the Court in which this action is pending.

The REFEREE: All of this, of course, is subject to a future motion to strike out. We have got to begin somewhere.

Marked Plaintiff's Exhibit 1.

Q. Mr. de Lisser, you have testified as to The New York Press. Is this The New York Press that is published and has been for many years published in the County of New York?

Mr. KIERNAN: Objected to as leading.

The REFEREE: I will allow it.

Exception by Mr. Kiernan.

A. Yes, sir.

Q. What is the circulation of your paper?

A. Around 100,000 copies a day.

Mr. KIERNAN: Objected to unless the witness has knowledge, if your Honor please, and I ask that the answer be stricken out and for leave to cross examine him as to that.

The REFEREE: I will overrule the objection.

Exception by Mr. Kiernan.

Mr. KIERNAN: May I cross examine?

Mr. CLASS: Just a moment.

Q. Has this been the circulation of The New York Press for as long as a year past or several years past?

54 Mr. KIERNAN: I object to it, if your Honor please, on the same ground as before, that the witness has not been shown to have any knowledge on the subject, and moreover my motion for leave to cross examine is pending.

The REFEREE: On cross examination you can bring out whether he has any knowledge or not.

Q. Mr. de Lisser, what is the foundation for your knowledge of the publication of The Press?

A. I have a sworn statement of the Circulation Manager as to the circulation being 80,000 in Greater New York; also I have access to the circulation books which books show me that we have almost 20,000 outside of Greater New York.

Mr. KIERNAN: If your Honor please, I move to strike out the answer on the ground that it is clear that the witness is testifying from secondary knowledge.

The REFEREE: I will overrule the objection.

Exception by Mr. Kiernan.

Cross-examination by Mr. KIERNAN:

Q. Mr. de Lisser, is this Exhibit 1, was that published in your paper; was this Exhibit 1 which I show you published every day in your paper from the 5th day of November to the 25th day of November, 1908 (handing paper to witness)?

A. It was, yes, sir.

Q. There was no exception during that period?

A. No exception.

55 Q. I call your attention specifically to the dates after the 21st day of November, 1908, and I ask you if that was published on the 22nd, 23rd, 24th and 25th days of November, 1908?

A. It was, yes, sir.

56 Mr. KIERNAN: May I make a motion to amend my answer, Mr. Class?

Mr. CLASS: You ought not to amend your answer at this late date.

Mr. KIERNAN: It will help you. I will make the motion. Paragraph VIII of the plaintiff's complaint reads as follows: "The defendant New York Steam Fitting Company entered upon the performance of said contract and on or about February 19, 1908, duly completed the same and furnished all of the material and performed all of the labor required to be furnished and performed according to said contract." The answer of the Surety Company in paragraph IV denies each and every allegation contained in paragraph VIII which I have just read, except it admits the New York Steam Fitting Company entered on the performance of the contract, and at or prior to February 15, 1908, duly completed the same and furnished all the materials except such materials and labor as were exempted. Now, I simply ask to strike out of my answer paragraph IV so as to allow the pleading of the plaintiff in paragraph VIII to stand.

Mr. CLASS: I object to any amendment of the answer at this late date.

Mr. KIERNAN: Will you stipulate on the date of the completion of the contract?

Mr. CLASS: No, I will not.

57 The REFEREE: I will deny the motion on the ground that sufficient notice has not been given, and it is not a motion to make the pleadings conform to the proof.

Exception by Mr. Kiernan.

Mr. KIERNAN: Furthermore, inasmuch as they plead in their complaint that by paragraph XVI that "no action or suit has been brought by the United States against the defendant within six months thereafter, nor had one year elapsed since the performance and final settlement of the contract by the New York Steam Fitting Company prior to the commencement of this action", I move for the dismissal of the complaint on the ground that there is nothing in the complaint to show that no action was begun by the United States of America against both defendants, it does not specify against which defendant no action was brought, and the reading of the paragraph seems to indicate that the defendant referred to is the New York Steam Fitting Company and not The Title Guaranty & Trust Company. I call your Honor's attention to the fact that unless they put this before the Court and show that no action was begun against the Surety Company within six months that they have no right to begin this action, their only right to begin this action accrued six months after the final settlement and completion of the contract, and only then provided the United States of America has not begun any action. As a decision right
58 in point I call your Honor's attention to the case of Stitzer and The Title Guaranty & Trust Company vs. The United States of America to the use of William F. Vaughn, decided in the Circuit Court of the United States for the Eastern District of Pennsylvania, October Term 1910.

The REFEREE: That allegation would seem to be defective. What have you got to say about that, Mr. Class?

Mr. CLASS: The word "defendant" there, in the light of the entire amended complaint, clearly was intended to be "defendants"; it is a mere typographical error of the stenographer; the complaint in its entirety indicates that. This is the amended answer that was served upon the defendant Surety Company, as well as upon the New York Steam Fitting Company. I would add further, your Honor, this action is brought under an act of Congress which is remedial in its character and is to be construed most liberally with reference to the remedy that it seeks to secure to a sub-contractor. This act of Congress was given as a substitute to sub-contractors for the right of a lien affor-ed under the common law, which is denied to a contractor with reference to all public buildings, and under the adjudications of the Federal Courts this act that has been held, this very act, or, rather, the original act of which this present act is in some slight degree an amendment, has been held by the Supreme Court of the United States to be an act which must be construed with a view to effectuating the legislative intent,
59 to-wit, the securing of payment to all contractors who put labor and material in the construction of public federal buildings.

Mr. KIERNAN: I call your Honor's attention to the fact there is no testimony before you yet, of course, as to when this action was commenced; therefore you do not know whether it was commenced within six months after the final completion of the contract, the final settlement for it, or not. I have tried to get in evidence by

amending my answer a definite statement as to when the contract was completed; my adversary opposes my motion. Therefore he is taking before the Court a cloudy state of affairs which prevents you from knowing whether the action was a violation of the Stitzer case or not.

Mr. CLASS: If your Honor please, there is deposited with the Clerk of the United States Circuit Court a certified copy of the original check given in final payment for the claim of the New York Steam Fitting Company. That original check was brought on from Washington upon the initiative of my adversary, Mr. Kiernan——

Mr. KIERNAN: I object to all this, if your Honor please; it is introducing something by way of argument that ought not go in.

The REFEREE: I do not think this has anything to do with this precise question.

Mr. KIERNAN: I am willing to stipulate that the contract
60 was completed.

Mr. CLASS: I will bring down from the Circuit Court at the next session the check.

The REFEREE: This has not anything to do with this as far as I can see. It is a question whether the allegations of your complaint are sufficient under the statute. The action was brought under a certain statute, and you have got to allege a cause of action under that statute. Now, here you have not expressed yourself just as you ought to.

Mr. CLASS: No surprise can be claimed by my adversary. I was going to ask that your Honor consent to the amending of the pleadings so as to add the letter "s" to the word "defendant" in paragraph XVI to the amended complaint. It cannot be claimed by my adversary that he is taken by surprise, nor that he is prejudiced in any way in the light of the entire complaint.

Mr. KIERNAN: If your Honor please, my adversary did not plead surprise a moment ago when I moved to amend my answer, and the answer your Honor gave I urge now.

The REFEREE: It is different now because you brought this point up showing that you had knowledge of it. The other point you brought up he claimed he did not have any knowledge of, and that is why I denied it.

Mr. KIERNAN: You must have misunderstood entirely the effect of what I wanted. What I wanted was to admit part of his
61 case, the date of the completion of his contract. He must prove that at some time or other.

The REFEREE: I will deny it now simply on the ground there has been no notice of motion. You can give notice now that at the next hearing you will urge it and I will consider it, but I do not think you can make a motion right off the bat and ask for a ruling.

Mr. KIERNAN: You can always make a motion on the pleadings at any stage.

The REFEREE: We have got by that. I am referring to the other one.

Mr. KIERNAN: I am moving to dismiss the complaint.

The REFEREE: Keep the two things separate. You have made two motions, the first one was to amend your answer by striking out one paragraph. I say I will not grant that because you have not given notice of such a motion. That disposes of that. You can give notice and make that whenever you please; that is entirely without prejudice. Now you come to this, and you ask to dismiss the complaint on account of defects in paragraph XVI. That motion I think is in order at the present time.

Mr. KIERNAN: Would your Honor like to read the Stitzer decision now?

The REFEREE: Yes. (Reading decision.) I think that allegation has got to be in the language of the statute, and that
62 you should certainly make the allegation. There are two objections here, one is you use the word performance instead of completion, and you have used the word defendant without it appearing which of the defendants it applies to or whether it applies to all of them.

Mr. CLASS: Will your Honor permit me to read the decision of Mr. Justice Day in a case brought under this very act. The word "defendant" may refer to either. It is to be remembered, too, when this action was commenced both defendants were represented by one attorney, Messrs. Hardy & Shellabarger.

The REFEREE: You made a complaint before you had any representation on the part of anybody.

Mr. KIERNAN: Besides you served that complaint on me.

Mr. CLASS: Since that time the New York Steam Fitting Company has gone into bankruptcy and was in process of bankruptcy as of the time when that amended complaint was drawn, all of which has tended to leave the situation——

The REFEREE: I can see how that state of facts would have a tendency to cause this form of allegation, but I do not think it approved it.

Mr. KIERNAN: A corporation is not dissolved by bankruptcy; you can still sue it.

Mr. CLASS: In the case of The United States for the use of Hill vs. The American Surety, 200 U. S.; this action was brought
63 under this statute.

Mr. KIERNAN: Where it took in a sub-contractor, it said where the act applied to a sub-contractor.

Mr. CLASS: No.

The REFEREE: The objection made to those paragraphs is simply what it says, to the form of the allegation, and I understand it is limited to that, that you do not allege enough to bring your action under the statute. Now, does that case bear upon that question?

Mr. CLASS: It bears on the construction of this statute in a very liberal way with reference to the sub-contractor to effectuate the ends of justice.

The REFEREE: I do not think we have got as far as that, whether it should be liberally or strictly construed; it is whether you have alleged the cause of action under the statute. I do not think you have. It is a well recognized principle when you are suing under

a statute you have got to allege very clearly to bring it under the statute.

Mr. CLASS: It is evidently the omission of that "s" is a mere inadvertence.

The REFEREE: I think that is inadvertent, but he objects also, as I understand it, to the word "performance" that you use there.

Mr. CLASS: It says performance and final settlement.

64 The REFEREE: The statute says completion.

Mr. CLASS: Are they not synonymous terms, your Honor?

The REFEREE: They may be and may not.

Mr. CLASS: If you perform a contract and complete a contract.

Mr. KIERNAN: You can perform a contract and not complete it.

Mr. CLASS: Shall we on account on a quibble like that, your Honor, throw out of court a contractor who has put over $5,000 worth of material in a federal building, in view of the liberal construction given to remedial statutes of this character?

The REFEREE: You better think about that until the next session. He has moved to dismiss the complaint. Now, I won't rule on that, but I will hear argument at the next session as to anything that comes as a surprise to you.

Mr. KIERNAN: First I will make a motion to strike out Exhibit No. 1, which is the paper offered in evidence by Mr. Class as showing the publication of the notice. I move to strike that out on these grounds: First, that there was no order of court obtained for the giving of that notice. I will leave that for the present. They may say there was. The second ground I think is more serious. By paragraph VIII of the complaint they allege: That on or about February 19, 1908, the New York Steam Fitting Company duly

65 completed the contract and furnished all of the material and performed all of the labor required to be furnished in the performance of said contract." The last publication of that notice, if your Honor please, of the notice which has been offered, was November 25, 1908. Under the act the last publication of such a notice must expire three months before the end of the year before the final completion of the contract. That would expire, if your Honor please, on November 18th. Your Honor can see, a publication of seven days over the time, if publication there ever was.

The REFEREE: Aren't you getting your motions a little mixed up? You are moving to strike out the evidence, which you press.

Mr. KIERNAN: This is a proceeding brought under the act. This notice cannot comply with the act because it was not published within the time.

The REFEREE: You can put that on record, but I do not know what the proof is going to be. There is not proof enough now.

Mr. KIERNAN: Take the complaint, it says February 19th. I asked Mr. Class to stipulate as to the completion of the final settlement of the contract and he refused to do so.

Mr. CLASS: We say "on or about," and that does not hold us. We may show there was work done a considerable time after the 19th of February.

Mr. KIERNAN: Then you are going back to your old point
66 so the action began within six months after the final settlement. You have got to take one horn of the dilemma one way or the other.

Mr. CLASS: I am prepared to.

The REFEREE: I see the point. I will deny the motion for the time being.

Exception by Mr. Kiernan.

The REFEREE: Your motion now is simply to strike that out. You say you have another motion to dismiss?

Mr. KIERNAN: No, not at this time.

Mr. CLASS: Does your Honor care to hear me as to the construction of the statute?

The REFEREE: We have not got as far as that yet. You better consider pretty carefully those two points he has got there; we better get all the underbrush cleared away before we get to the main case.

Mr. CLASS: Mr. Scobel is a member of the New York Bar, and I would like to have him testify as to the service of certain creditors.

The REFEREE: All right.

67 JOHN M. SCOBEL, a witness called on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. CLASS:

Q. Mr. Scoble, what is your business?

A. Attorney and counselor at law.

Q. In the State of New York?

A. In the State of New York.

Q. I show you this paper and ask you whether you served any persons in this proceeding with that paper (handing paper to witness)?

A. I did, by leaving with the said persons true copies thereof.

Q. Whom did you serve?

Mr. KIERNAN: Objected to as incompetent, irrelevant and immaterial, no foundation laid for it. The act says all known creditors must be served with such notice as the Court may order.

Mr. CLASS: I am introducing this a little out of order, if your Honor please. It is for the convenience of Mr. Scobel, a member of the Bar. I furthermore desire to raise a question as to the interpretation of the statute as to whether or not the statute actually calls for an order to be entered with reference to the service of notice upon these creditors, so I will ask to have this held for the present.

The REFEREE: I will take it, subject to the objection and without prejudice to a motion to strike it out if the testimony is not
68 sufficient to make it relevant.

Q. Whom did you serve?

Mr. KIERNAN: Objected to, if your Honor please, on the ground that whom you served does not imply anything under the statute.

Mr. CLASS: I will connect it under the notice.

The REFEREE: I will let him testify for the time being whom he served, without prejudice to your subsequent motion.

Exception by Mr. Kiernan.

A. On the 21st day of November, 1908, I served it upon H. P. Daniels, director for Peet & Powers at No. 45 West 34th Street, Borough of Manhattan, City of New York. On the same day I served on John J. Grace, Secretary and Treasurer of Herrmann & Grace, at No. 673 Bergen Street, Brooklyn, City of New York. On November 19th on Nathan Fleisher, Treasurer of Henry R. Worthington, at No. 115 Broadway, Borough of Manhattan, City of New York. On November 20th on John Simmons, Vice President of John Simmons Company, at No. 110 Centre Street, Borough of Manhattan, City of New York. On November 19th on C. E. Watrous, Manager of Cutler-Hammer & Company, at 50 Church Street, Borough of Manhattan, City of New York. On November 20th on I. L. Collins, Treasurer of Robert A. Keasbey Company, of 100 North Moore Street, Borough of Manhattan, City of New York.

Q. Did you leave a copy with each of those persons per-
69 sonally?

A. I did.

Mr. CLASS: I now offer in evidence a copy of the notice as to which Mr. Scobel has just testified.

Mr. KIERNAN: Objected to as incompetent, irrelevant and immaterial.

The REFEREE: Objection overruled for the time being, without prejudice to a motion to strike out subsequently.

Exception by Mr. Kiernan.

Marked Plaintiff's Exhibit 2.

Cross-examination by Mr. KIERNAN:

Q. Mr. Scobel, how do you know that John J. Grace is the Secretary and Treasurer of Herrmann & Grace?

A. I went in his office and asked to be directed to one of the officers or directors of the company. The party I spoke to referred me to some officer or director, and informed me who he was. After he did that I went up to him and inquired if he was the party whom the first party said he was, and in each case he told me he was.

Q. Does that apply to all those you served?

A. Yes, sir.

Q. Did you ever before see the man you called John J. Grace?

A. No, sir.

Q. Could you identify him to-day?

A. This was over two years ago.

Q. Who was the man you asked to point him out?
70 A. Some clerk in the office in each case.

Q. You did not know who he was, or anything about him?

A. No, sir.

Q. You do not know whether he had any knowledge of the fact?

A. He was a clerk in the office who appeared to be familiar with the office, and in some instances seemed to have charge of it.

Q. You do not know whether he had any personal knowledge, do you, of the officers and directors of the corporation? Answer me yes or no?

A. In a majority of the cases he spoke to the party I served, and the party answered him.

Q. Your only knowledge then came from the clerk and the person answering him?

A. Yes, sir; and from the fact that it was in the office of the company to whom the papers were addressed.

Q. Did you serve any other persons with notice besides these?

A. No.

Q. Before or after?

A. No, I did not.

Q. Who gave you these names to serve?

A. Mr. Class.

Q. Did you make any inquiries yourself as to who these persons were whom you were to serve?

Mr. CLASS: He has testified to that.

Q. As regards the New York Steam Fitting Company?

A. I do not quite understand your question.

71 Q. Did you make any inquiries yourself as to the relations of these parties to the New York Steam Fitting Company?

A. No, sir, I did not.

Q. You just acted at that time as a process server?

A. I just acted at that time as a process server.

Q. And you had no personal knowledge at that time of who these parties were?

A. No further than I have testified.

Q. You did not make any efforts to find out the names of any of the creditors of the New York Steam Fitting Company?

A. No, sir.

Q. Did you have any other papers to serve besides these?

A. No, I did not.

Q. These were the only ones?

A. Those were the only papers I served.

Q. No other papers were given to you?

A. No, sir, there were not. At that time, while I was not connected with Mr. Class, I assisted him with a good many of his cases; I was not a regular process server and very seldom served process except in cases of this kind.

Redirect examination by Mr. CLASS:

Q. Did I understand you to say in each case the party whom you served stated that they were the parties whom you sought?

A. I did.

72 Mr. CLASS: If your Honor please, I would like to put Mr. Ackerson on the stand with regard to his efforts.

The REFEREE: Yes, you may do so.

JOHN B. ACKERSON, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. CLASS:

Q. What is your business, Mr. Ackerson?
A. Treasurer and General Manager of The Alexander Bryant Company.
Q. The plaintiffs in this action?
A. Yes, sir.
Q. State what, if any, efforts you made at my request to ascertain the creditors of the New York Steam Fitting Company as of about October or November, 1908?

Mr. KIERNAN: Objected to as irrelevant, incompetent and immaterial.
The REFEREE: I will allow it.
Exception by Mr. Kiernan.

A. My efforts were in the shape of an inquiry from our foreman at the building, Mr. Wallace, who was there continually, and should have known all the people interested with the New York Steam Fitting Company.

Mr. KIERNAN: I ask that the answer be stricken out—should have known.
The REFEREE: Strike that out.

73 Q. Did you make any other efforts to ascertain who the creditors of the New York Steam Fitting Company were?

Mr. KIERNAN: Objected to as leading. The witness has already testified that his efforts were confined to inquiries of the foreman of the building.
The REFEREE: I will allow the question.
Exception by Mr. Kiernan.

A. No, I made no other efforts.
Q. Did you inquire through Mr. Higgins?

Mr. KIERNAN: I object to that form as leading. The witness has already testified twice he made only one set of inquiries. Who Mr. Higgins is I am not familiar with.
The REFEREE: The question is objectionable in view of the answer, still I do not want to hold you down very close to such a line.
Mr. CLASS: I want to find the sources of his inquiries.
The REFEREE: I will allow the question.
Exception by Mr. Kiernan.
The WITNESS: Is there any way of amending that answer?
Q. Certainly.
A. Then I will amend my answer and say——
Q. Tell us if Mr. Wallace was in a position to know these things, if you can?
A. Well, I cannot say positively that Mr. Wallace did know; he was the only man in our employ that would know.
74 Q. Was he on the job there constantly?

Mr. KIERNAN: Objected to as incompetent, irrelevant and immaterial.

The REFEREE: I will allow that.

Exception by Mr. Kiernan.

A. Yes, sir, he was.

Q. He superintended that job from beginning to completion, did he not?

A. He did.

Q. And he saw all of the materials brought in and installed?

Mr. KIERNAN: Objected to as leading and calling for the witness' opinion.

The REFEREE: Yes, that is so.

Q. What information did you get concerning the creditors of the New York Steam Fitting Company?

Mr. KIERNAN: Objected to as secondary evidence. Mr. Wallace they certainly could produce; this is mere hearsay.

Mr. CLASS: As an officer of the company he made diligent efforts to inquire; he inquired along the lines most likely to elicit the information. He inquired through this foreman, who was in a position to see every contractor or representative that contributed to the building of that custom house, and the line of this inquiry is to bring out the fact that Mr. Ackerson made this effort to ascertain.

75 Mr. KIERNAN: Now, your Honor, the meaning of that law, such notice to creditors as the Court may order, is simply this: If a plaintiff goes in to serve creditors and takes the risk upon himself, then he must bear the burden if he does not notify all creditors. On the other hand, if he does not know all the creditors he can apply to the Court and he has all the plenary powers of the Court to assist him in getting the information. The Court can order an officer of the defendant company to appear before the Court, to produce the books, and to show the creditors, and then the Court may order what service is to be made upon them. Take another view of it, take one of these large contractors, the creditors of that firm are not confined to the Southern District of New York. The process of the Southern District of New York and papers relating to an action pending in the Southern District of New York have no efficacy outside that district. How will you serve such papers? Naturally in the way the Court may order. The rule of law is distinctly to give notice to a party. When the practice requires a notice must be given, that notice must be served personally or in such a way as will be brought directly to the person's knowledge. Here this gentleman comes in—I do not question his good faith at all—and what does he do? Does he go to the New York Steam Fitting Company and ask for a list of their creditors so as to have it on record they refused, if they did refuse? Does he do anything more than ask one of their own employees?

76 The REFEREE: I think as far as that feature is concerned it is simply a question of good faith; it says "All known creditors." How you can tell just what the knowledge of a corporation is I do not know.

Mr. CLASS: Will your Honor hear me on that point? This statute by no means is necessarily construed as indicating that the Court must issue an order concerning who shall be served as creditors. I take it that this last section of the Act of Congress may be interpreted as meaning that the Court order must issue with reference to the right of intervening creditors, that it is the creditor who desires to interpose who must obtain the Court order.

Mr. KIERNAN: No, it is the plaintiff who must give that notice; he must give that notice provided he does such a thing, he must publish in a paper and give such notice.

Mr. CLASS: The act is explicit with respect of the things that are to be done. Those things have been fully complied with, no court order could have been made that would have more explicitly included the things mentioned in the statute than the notice actually served on these creditors. Furthermore, if your Honor please, this defense is not to be set up by the defendant Surety Company. If it is a defense at all it belongs to an intervening creditor or one who did not intervene, and the Surety Company, who is in the
77 position of the bondsman of the defaulting contractor here, cannot plead that statute in its favor, I respectfully submit.

Mr. KIERNAN: Why not? You have got to sue under the statute, and in order to sue under the statute you must comply with every step of it.

Mr. CLASS: The Court could make an order nunc pro tunc justifying the service of this particular notice to creditors and the publication thereof.

Mr. KIERNAN: I will stipulate with you now to suspend proceedings and you make an application for an order nunc pro tunc, and I will produce a stack of proofs of claim against the New York Steam Fitting Company.

Mr. CLASS: If your Honor please, there are so many abstruse feature- under this Act of Congress, and in as much as this is the first case to be litigated so far as the reports indicate under this particular amended law, I respectfully submit that the rule of the Circuit Court should be applied and the most liberal possible construction should be given favorable to the sub-contractor who is here asking for compensation.

The REFEREE: We have got to find out what the statute means. Find out what the statute is first and then the application of it, that is another matter.

Mr. KIERNAN: This matter has been before the Circuit
78 Court so many times I could not tell you the number.

The REFEREE: I do not see anything here regarding any search for creditors.

After discussion, the further hearing is adjourned to Tuesday, August 22, 1911, at 2 P. M.

Last Plaintiff's Exhibit—2.

79 UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT CO.
vs.
NEW YORK STEAM FITTING COMPANY et al.

NEW YORK, *August* 22, 1911.

Present: The Referee, George B. Class, Attorney for Plaintiff; Adrian T. Kiernan, Attorney for defendant The Title Guaranty & Trust Co. of Scranton, Pa.

Mr. KIERNAN: The discussion and motion that I made the last time was to move to strike out an exhibit in this matter, the proof of publication in the New York Press upon the ground that it had not complied with the statutes. If you want me to go ahead, all right.

The REFEREE: On the ground that it had not complied with the statute?

Mr. KIERNAN: Yes, in not having been published within the proper time, in that the last publication did not expire three months before the expiration of the year from the final settlement and completion of the contract, which was the time limit for creditors
80 to come in and intervene in an action and be made a party thereto.

Mr. Melville, may I ask you to look at Section 65 of that new law on that subject, look at the last sentence; it explains those words "the *lime* limit therefor."

You will see, Mr. Referee, that they have changed the dates there so that the publication must be for six weeks instead of three weeks as in the Federal statutes, the last publication must be two months before the time limit for intervention instead of three months as in the Federal statutes.

Mr. CLASS: Will you hear me on the matter?

The REFEREE: Yes.

Mr. CLASS: My argument is incorporated in a brief that I have prepared with some care, your Honor, and if you desire I will discuss it for a matter of record.

The REFEREE: The stenographer does not need to take it down, then.

Mr. CLASS: I don't think it is necessary. (Reading brief and discussing same.)

If your Honor please, I offer in evidence a stipulation bearing date November 21, 1908, entered into between the attorney of the plaintiff herein and Messrs. Hardy & Shellabarger, attorneys for the defendants herein.

Mr. KIERNAN: I have objections, but I believe your Honor wants to read it before you hear me.

81 The REFEREE (examining exhibit).

Mr. KIERNAN: I object to this stipulation as incompetent, irrelevant and immaterial, and not binding upon the defendant, The Title Guaranty & Trust Company.

Provision is made in this stipulation in order to make it effective thus: That the defendant waives any failure on the part of the plain-

tiff to notify creditors under the third proviso of the statute provided no more such notices are sent; and stipulation is dated November 21, 1908.

I proved, if your Honor please, by Mr. Delissar when he was on the stand, and I was very careful to bring out each separate day, that the notice in the New York Press was continued on the 22nd and 23rd and 24th and 25th, therefore the condition of that stipulation was violated, and the stipulation is null and void.

Now, if your Honor pleases, a further ground I want to urge upon you, showing the immateriality of that stipulation, and urging you to rule it out on the ground that such a stipulation as that could not be fairly and squarely entered into between the plaintiff and defendants, is this: Such a stipulation as that is in legal fraud of creditors.

I do not say that either of the gentlemen—for they are both good friends of mine—ever intended that; I think they did not see
82 exactly what the stipulation meant, but the effect of it is legal fraud. Now, if your Honor pleases, the surety company cannot go to a plaintiff in this action and get such a stipulation as that and the court will afterwards rule that that stipulation is effective as relieving the plaintiff from making the publication required by the statute and serving the creditors as required by the statute; then the ruling of the court will be a mighty valuable thing for the surety company in that case, for all the surety companies would have to do after that is for them to go over to the plaintiff and get such a stipulation and shut out any possibility of any other creditors from getting in their actions and thus save hundreds of thousands of dollars every year.

The publication of the notice to creditors and service of notice upon the creditors is a jurisdictional matter. This statute is what you might call a "fair play" statute which gives everybody equal rights. If the plaintiff, having assumed control of the action—and there can be no other action brought, for the statute says only one action can be brought—can go to work and shut out all other creditors by such a stipulation as the one offered in evidence, then the whole object of the statute falls; the statute becomes a very convenient and useful article to a selfish creditor.

Take this view of it: If a claim is against the bond
83 and is for far more than the amount of the bond, under the statute the surety company might deposit the amount of the bond and there would be a pro rata distribution, provided all creditors were in. If such a stipulation as that offered in evidence, were effected, the plaintiff would neglect to notify the creditors, would neglect to make the publication required by law, and would see thereby that he got 100 cents on the dollar. That is the object of such a stipulation as that. Neither the plaintiff nor the defendant had any right to enter into such a stipulation. Neither of the parties has the power to alter the United States statute, and therefore I urge upon your Honor on the ground that I have stated that this stipulation be excluded from evidence.

Mr. CLASS. Answering Mr. Kiernan's argument, I respectfully

submit to your Honor that he is estopped from attacking the propriety or validity of the stipulation. While it might be appropriate for a creditor who may have shown himself to have suffered harm from such a stipulation to object thereto, I submit it is wholly improper and unlawful, and inequitable for the attorney for this company after having entered into a stipulation of this character——

Mr. KIERNAN: I didn't enter into it.

Mr. CLASS: —and now disclaim it. The objection that the
84 present attorney did not enter into the stipulation makes the stipulation no less binding upon the attorney of record as of the time it was entered into.

Answering the first objection offered by Mr. Kiernan, to wit: that the published notices to creditors were continued several days after the date of the stipulation, I beg to direct your Honor's attention particularly to the words "provided no more such notices are sent," and especially to the word "sent." The word "sent" is the key word which stands for the express understanding between myself and the attorneys for the surety company and the defendants Steam Fitting Company, to wit: No more personal notices shall be sent as of the time of the making of that stipulation. The Steam Fitting Company had the possibility of getting out of this difficulty and they were threatened with insolvency, and your Honor perhaps knows—I may say parenthetically, that they were forced into insolvency—and they pleaded with me that such a stipulation be entered into, and it was entered into. The provisions of that stipulation have been faithfully lived up to by the attorney for the plaintiff; no notices were sent to any creditors subsequent to the date of the stipulation. Indeed, the plaintiff had sent notices to every creditor whom they could discover as such.

Mr. KIERNAN: Mr. Referee, I would like to put three questions to my friend:

The first question I would put to him is: Is the statute
85 for the benefit of all creditors, or for the benefit of a very few?

Secondly——

Mr. CLASS: Is this a matter of record, your Honor?

The REFEREE: Well, it might as well be taken down.

Mr. KIERNAN: Secondly, how were the other creditors to get notice of the pendency of the action if the plaintiff and the defendant in this action might effectively dispense with the sending out and service of notice as the statute required?

I will stop with those two——

Mr. CLASS: Are you through?

Mr. KIERNAN: No, thirdly: Mr. Class says it is not for us to make any objection here—that is for the surety company; it is for some creditor who was injured by the thing.

Now how could any creditor who was injured here have any standing here? He could not be made a party to it after that year; he could not be an intervenor in this action in any sense of the word; how then could he make any objection?

Mr. CLASS: There is nothing on the record so far to indicate but

what every creditor of the defendant Steam Fitting Company was served both personally and by notice.

Furthermore, I reiterate that such defense as might be set up by a creditor who could show himself to have suffered loss
86 by any such stipulation cannot under any theory, legal or equitable, be set up by the defendant Surety Company.

The defendant Surety Company is estopped by its own action. It cannot at one moment use the stipulation as a shield, and then in the next moment use it as a club as against the party with whom he entered into the stipulation.

Mr. KIERNAN: Now, to answer Mr. Class just one minute further: Mr. Class has said that this stipulation is only limited to notices sent out to the creditors. If that is so, your Honor, then it has no bearing on the question that I am urging before you now: The striking out of the affidavit of service—the affidavit of publication of notice in the New York Press; because, according to Mr. Class's own statement, this stipulation only applies to notices sent out to the creditors, that is personally served creditors.

Mr. CLASS: Answering this, your Honor I would say that this stipulation was intended to serve the purpose which is indicated on its face, to wit: It was intended to operate as a waiver on the part of both parties of any failure whatsoever on the part of the plaintiff to notify creditors under the third proviso of the statute which includes notice—any failure of notice, either personal in character or through advertisement. The stipulation, however, which was binding upon the attorney for the plaintiff, and
87 which served as the consideration or the moving cause for the entering into of this stipulation was the agreement on the part of the plaintiff that no more personal notices should be sent to creditors.

Mr. KIERNAN: Mr. Referee, may I just read you that?

The REFEREE: I have read it, I know what it is.

Mr. KIERNAN: Can I quote you just one thing more? Mr. Class now says that this stipulation covers both kinds of notices provided by the third proviso. According to that that covers both kinds of notices, both personal and advertisements, and this stipulation was to make an exception of one it was to make an exception of both. Consequently his statement does not seem to bear out what the stipulation has on its face.

Furthermore, Mr. Class, when I objected to the offering in evidence of the proof of advertisement in the New York Press at page 5 of the minutes, says this concerning such advertisement: "I might say, your Honor, the Federal statute requires the insertion of such advertisement." I think Mr. Class can explain that statement now.

Mr. CLASS: What is the context of that?

The REFEREE: Well, now, have we touched on all the points of law that are going to arise, that is preliminary points of law, all of them as yet?

Mr. CLASS: No, we haven't, your Honor.

Mr. KIERNAN: We are merely skimming the surface, your
88 Honor. If your Honor rules my way on this one question, why, that ends the case, in my view of it. If you are not

with me, then there are many other questions that will surely arise.

The REFEREE: What I thought about was this: You didn't want to have to do any useless work before the Referee. If I was fully decided that that publication had to be made and concluded within three months before the expiration of the year and that thing had not been done, why, that could not be overcome. Now, in that event that would dispose of the case.

Mr. KIERNAN: Yes, your Honor, that is what we claim.

The REFEREE: And if I make my decision on that, then you can take your appeal on that.

Mr. KIERNAN: Yes, sir.

The REFEREE: And that would be all that is necessary.

Mr. KIERNAN: Yes, sir.

The REFEREE: And if there are any other points that you would want to go up on in case I was wrong about it, why it would be best to get them together and dispose of them, too.

Mr. KIERNAN: That is the principal point, Mr. Referee.

The REFEREE: I will admit the stipulation, although it is not exactly evidence.

Mr. KIERNAN: Your Honor will allow me an exception.

Received in evidence and marked Plaintiff's Exhibit 3.

89 Mr. KIERNAN: I will stipulate at the request of the plaintiff that a considerable time subsequent to the date of the stipulation which has just been offered in evidence, I was substituted as attorney for the defendant The Title Guaranty & Trust Company in the place of Messrs. Hardy and Shellabarger and an order to that effect was entered in the United States Circuit Court for the Southern District of New York.

Mr. CLASS: Will you stipulate that an order was entered changing the name of the original party defendant, the Title Guaranty & Trust Company of Penna. to the Title Guaranty & Surety Company, and that such order was made on or about February 26, 1908, and was made pursuant to law.

Mr. KIERNAN: Yes.

Further adjournment in this matter was taken subject to the call of the Referee.

90 UNITED STATES OF AMERICA for the Use and Benefit of
ALEXANDER BRYANT COMPANY
vs.
NEW YORK STEAM FITTING COMPANY et al.

NEW YORK, *September* 13, 1911.

Present:

The Referee.

George B. Class, Attorney for Plaintiff.

Adrian T. Kiernan, Attorney for defendant, The Title Guaranty & Trust Company of Scranton, Pa.

WILLIAM WALLIS, a witness called on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. CLASS:

Q. Are you in the employ of the plaintiff in this action, Alexander Bryant Company?
A. Yes, sir.
Q. In what capacity?
A. As foreman, superintendent.
Q. Did you act in that capacity in connection with their contract for the mechanical equipment of the Custom House?
A. Yes, sir.
Q. How long were you on that job?
A. I was on the job from the start of it to the finish of it.
Q. State what instructions, if any, you received from Mr. Ackerson, the treasurer and general manager, as to obtaining the
91 names of the creditors of the New York Steam Fitting Company and those supplying labor and material in connection with the building of the Custom House?

Mr. KIERNAN: Objected to as immaterial and irrelevant; the instructions this gentleman received are not binding on this defendant.
The REFEREE: I will allow it.
Exception by Mr. Kiernan.
Mr. KIERNAN: I object to it also on the ground that it calls for a conclusion, asking this witness to state what instructions he received as to obtaining the names of labor and material men.
The REFEREE: I will let him answer that question.
Exception by Mr. Kiernan.

A. I was asked by Mr. Ackerson to find out and to furnish him the names of people that were furnishing material and doing work in connection with the mechanical work of the Custom House, and I gave him as many as I knew of at that time, John Simmons——
Mr. KIERNAN: Gave him what?
The WITNESS: Gave him the names of these several firms at that time, the John Simmons Company, Peet & Powers, Herrmann & Grace, Crane Company, Henry R. Worthington.
Q. You can refer to any memoranda if you have it to as-
92 sist your memory if you cannot recall without it?
A. It is quite a time ago.

Mr. KIERNAN: May I cross examine him before he uses that memorandum?
The REFEREE: You can ask him any question you wish with reference to the memoranda.
Mr. CLASS: Perhaps he can recall without memoranda.

Q. If you can recall the names, why, give them?
A. The John Simmons Company, Peet & Powers, Herrmann & Grace, Crane Company, Henry R. Worthington, Haynes, Jones & Cadbury of Philadelphia, L. O. Koven; that is about all I can remember now.

Q. Did you furnish Mr. Ackerson with a written memoranda of these names?

Mr. KIERNAN: Objected to as incompetent, irrelevant and immaterial.
The REFEREE: Question allowed.
Exception by Mr. Kiernan.

A. Yes, sir.
Q. Are you sure that you included in that list the name of Crane & Co. and Haynes, Jones & Cadbury?

Mr. KIERNAN: Is this cross examination or is it direct examination? I object to that form of question, if your Honor please.
93 The REFEREE: I will allow it.
Exception by Mr. Kiernan.

Q. Are you sure that you included in that list the name of Crane & Co. and Haynes, Jones & Cadbury and this somebody by the name of Koven, or something of that sort?
A. I am not so sure in what way I gave him that list, yet I know that I gave him a list.
Q. Are you certain in your mind that those three were included in that list?
A. No, sir, I could not be sure.
Q. Haynes, Jones & Cadbury furnished material to the Alexander Bryant Company, did they not?

Mr. KIERNAN: Objected to as leading.
The REFEREE: I shall be pretty liberal with this. Go ahead.
Exception by Mr. Kiernan.

A. Yes, sir.
Q. Is it not a fact that Haynes, Jones & Cadbury furnished material direct to the Alexander Bryant Company?
A. Well, I could not say whether it was furnished direct to them or not; the material came there to the Custom House and was used.
Q. And you put it in the Custom House?
A. Yes, sir. I do not know whether it was furnished direct to them or not.
Q. And does this apply to this somebody by the name of Koven?
A. Yes, sir, in the same capacity.
94 Q. And this other party named Crane?
A. Yes, sir, they furnished material the same.
Q. And you people put it in?

Mr. KIERNAN: Objected to as leading, if your Honor please.
The REFEREE: I will allow it.
Exception by Mr. Kiernan.

A. Yes, sir.
Q. Do you remember whether or not you handed in the name of Keasbey & Co.?
A. Yes, sir.

Mr. KIERNAN: I object to that question. I did not get my objection on the record in time.

The REFEREE: I will allow the question.

Exeption by Mr. Kiernan.

Mr. KIERNAN: I ask that the answer be stricken out.

The REFEREE: I will allow it to stand.

Exception by Mr. Kiernan.

Q. Do you know whether or not the names that you furnished to Mr. Ackerson comprised all of the parties who furnished labor or material for the mechanical equipment of the Custom House?

A. As near as I can remember at that time it was, yes, sir. That is quite a while ago since that job was done.

Q. When you handed that list to Mr. Ackerson as of that time did you know that that was all the parties who furnished labor or material in connection with this mechanical equipment of

95 the Custom House?

Mr. KIERNAN: Objected to, if your Honor please, on the ground that he is now asking the witness whether he covered all the persons who furnished material, and the original question was not limited to that.

The REFEREE: I will allow it.

Exception by Mr. Kiernan.

A. Yes, sir.

Q. Do you remember including the name of Cutler-Hammer & Company.

Mr. KIERNAN: I object to that, if your Honor please.

The REFEREE: I will allow the question.

Exception by Mr. Kiernan.

A. I could not say that I can remember it, but I know there is material on the job.

Q. And you knew it at the time you furnished the names, did you?

A. Well, I cannot remember whether I furnished the name or not, but I know the stuff was there.

Q. And you knew at the time you furnished Mr. Ackerson with a list of the names?

A. Yes, sir.

Q. You cannot say you did not furnish that name?

A. No, I cannot say that I did not, or I did, because I cannot remember that.

Q. Did the persons and firms whom you have named fur-

96 nish all of the material and labor for the mechanical equipment of the Custom House?

Mr. KIERNAN: Objected to as leading, if your Honor please. He can ask the witness what he did down there and what he furnished.

The REFEREE: I think that calls for a conclusion. That might be all that he knew of.

Q. So far as you knew?

A. Yes.

Cross-examination by Mr. KIERNAN:

Q. Mr. Wallis, you stated that you were on that job from the start to the finish. What do you mean by that?

A. From the time we started work down there in the mechanical equipment of the building.

Q. At what period of the work down there did you start?

A. Well, after the four walls were up and the roof was on, the inside.

Q. Were there not other people at work there before you came?

A. Yes, on previous contracts.

Q. Do you know whether or not there were any people at work on the contract with the New York Steam Fitting Company?

A. I do not quite understand you now.

Q. Did you know before you went there there had not been other people working for the New York Steam Fitting Company on
97 this contract?

A. No, sir, I do not know.

Q. Do you know of your own knowledge?

A. I was there before the New York Steam Fitting Company started there.

Q. Do you know whether they ever employed anybody there whom you have not named?

A. Do I know?

Q. Of your own knowledge, whether there was any other person employed by them other than those you have named?

A. Besides those that I have named?

Q. Yes.

A. I cannot recall any now, sir.

Q. Could there not have been others there without your knowing it?

A. It is possible.

Q. You never asked anybody connected with the New York Steam Fitting Company what people had been furnishing materials did you?

A. No, sir, I did not.

Q. They brought some materials there themselves, didn't they, for the steam work?

A. I should judge they did, yes, sir, they must have, to get it in.

Q. You do not know where they got them or who furnished them, do you?

A. Simmons furnished the majority of stuff.

Q. Do you know whether Simmons furnished all of it, or not?

A. There was boilers there, I do not suppose Simmons furnished them.

Q. You do not know whether the Heinz people furnished them, do you?

A. No, sir.

98 Q. You did not name them, did you?

A. No, sir.

Q. You have named in answer to Mr. Class' question, Crane & Co. To whom did they furnish material?

A. They furnished material to the Alexander Bryant Company.
Q. Didn't they furnish it to the New York Steam Fitting Company, too?
A. I could not say. They furnished it to Peet & Powers.
Q. You do not know to whom else they furnished it, do you?
A. Those are the only two I know.
Q. You do not know whether they furnished any directly to the New York Steam Fitting Company, do you?
A. I could not say.
Q. But you did report them in to Mr. Ackerson, didn't you?

Mr. CLASS: He testified he was not sure.

A. About the Crane Company there were three firms there there was a question about, the Cutler-Hammer. The thing is four or five years old now.
Q. What do you mean when you say there was a question about them?
A. What I meant was I did not remember whether I furnished them, but they are in my mind now.
Q. Do you mean you did not know to whom they furnished material?
A. No, sir, I did not mean it that way; I meant it was a question whether I furnished Mr. Ackerson with that, or whether I
99 had not, but there was no question about them not furnishing some material.
Q. How many floors were there in this house?
A. There were eight floors, that is, eight above the ground.
Q. How many floors were you employed on?
A. On the entire building.
Q. Wasn't there a lot of other work going on under the New York Steam Fitting contract besides this?
A. Well, the mechanical equipment consisted of the plumbing, heating and ventilation and the electrical work.
Q. John Simmons had what part of the work?
A. He furnished material.
Q. What part of the work was he doing, just furnishing material?
A. Yes, sir.
Q. Peet & Powers had what work?
A. Peet & Powers had the electrical work.
Q. There were people furnishing them with materials, weren't there?
A. Yes, there must have been.
Q. You do not know the names of those people, do you?
A. No, sir, I do not.
Q. And that material went into the building, didn't it?
A. Yes, sir.
Q. Herrmann & Grace were furnishing what?
A. They were doing the ventilation.
100 Q. Do you know whether anybody furnished them with material that went into the building?
A. They would bring all their own stuff over.

Q. You do not know whether anybody furnished them with material?

A. It yas always their own wagons.

Q. Did you see all the material that came from Herrmann & Grace's, Mr. Wallis?

A. I cannot say I saw everything.

Q. Why don't you say that, Mr. Wallis?

A. Their material came already made up ready to instal.

Q. Haynes, Jones & Cadbury, what were they doing?

A. They were furnishing fixtures.

Q. Do you know whether anybody furnished them with material?

A. They furnished them to the building men to be installed.

Q. You do not know any subcontractor to them furnishing material, do you?

A. No, sir.

Q. There may have been some for all you know, mighn't there?

A. When you speak that way you take in this supply house that furnished material to a building that in turn are being supplied by somebody else.

Q. You do not know their names, do you?

A. No, sir. It was supposed to be Haynes, Jones & Cadbury furnished it. It may be it came from the West.

101 Q. And you acted on that supposition and made no further inquiries, did you?

A. That was all that was being furnished to us.

Q. You did not go beyond the people who were actually furnishing the things, did you; you did not go into subcontractors, in other words?

A. Not beyond them, no, sir, because they were the only people that were interested on that job as regards the furnishing of stuff to know where it was coming from; of course it has got to come from somebody else before it reaches them, there is no question about that.

Q. You say you gave Mr. Ackerson the names of the firms furnishing material so far as you knew them?

A. Yes, sir.

Q. Might there not have been others than those you have named?

A. I was pretty careful at that time to get as many at that time as I could, and if I have slipped any I do not know of it, and as you say, there might and might not.

Q. You might have slipped some?

A. And then again I might not.

Q. But you might have just the same?

A. And I might not.

Q. You did not make any inquiries of the New York Steam Fitting Company at all, did you?

A. Make any inquiries?

Q. Yes, as to who was furnishing material?

A. No, sir.

Q. These people whom you have named were all furnishing materials, weren't they?

A. Yes, sir, they was.

102 Q. How many laborers and working men were there employed in that building at that time in and about the New York Steam Fitting Company contract?

A. In the mechanical equipment of the building?

Q. Yes.

A. There was times there was more men——

Q. Roughly, on an average?

A. On an average there was around 100 men.

Q. Did you make any inquiries to see if they had all been paid or not?

A. No, I cannot say that I did.

Mr. KIERNAN: That is all.

The WITNESS: The Alexander Bryant Company was paying their men all the time.

Mr. KIERNAN: I move to strike that out.

The REFEREE: Motion granted.

Redirect examination by Mr. CLASS:

Q. Mr. Wallis, did any of the parties whose names you furnished Mr. Ackerson install the material they brought to the building; that is, did they employ any labor there as well?

A. They did, yes, sir, some of them did.

It is stipulated the copy of the contract and bond attached
103 to the complaint are exact copies of the same, subject to the correction of errors if any exist by the production of the original.

It is stipulated also that the specifications may be produced and offered in evidence by either party.

Mr. CLASS: I offer in evidence the original contract between the Alexander Bryant Company and the New York Steam Fitting Company.

Mr. KIERNAN: Objected to as incompetent, immaterial and irrelevant, but I do not object to the form of proof.

The REFEREE: I will overrule the objection.

Exception by Mr. Kiernan.

Marked Plaintiff's Exhibit 4, Sept. 13, 1911, G. J. C.

Mr. CLASS: Will you stipulate that among the parties served with personal notice, Peet & Powers and Phillips and Herrmann & Grace, appeared in this action and have filed their plea as intervening creditors?

Mr. KIERNAN: But that the action as against them has been discontinued?

Mr. CLASS: Yes.

Mr. KIERNAN: Yes, I will stipulate that.

Mr. CLASS: I offer in evidence a certificate of A. Piatt Andrew, Assistant Secretary of the Treasury, bearing date, Washington, November 26, 1910, with the seal of the Treasury Department affixed thereto.

104 Mr. KIERNAN: I object to it, if your Honor please, under the law; there is nothing to justify such a certificate as this. I am perfectly willing the first paragraph which shows the date of the final payment of the contract may go in, but the latter part in which the Assistant Secretary of the Treasury certifies no suit has been authorized by the Treasury Department upon the bond given in connection with the New York Steam Fitting Company contracts, on which bond the Title Guaranty & Trust Company of Scranton, Pa., are sureties, I object to.

The REFEREE: I will admit it.

Mr. KIERNAN: That is a matter that comes under the Attorney General's office; it does not come under the Treasury Department at all, sir.

The REFEREE: I think that is relevant.

Exception by Mr. Kiernan.

Marked Plaintiff's Exhibit 5, Sept. 13, 1911, G. J. C.

Mr. CLASS: I also offer in evidence a certificate of C. D. Hilles, Assistant Secretary of the Treasury, bearing date, Washington, January 11, 1911, under seal of the Treasury Department.

Mr. KIERNAN: If your Honor please, I object to this as incompetent, irrelevant and immaterial. The statute covering the admission of records, copies of records under the seals of the

105 different departments, simply covers the admission of a copy of the record; it does not cover the certificate of any officer of any department as to any fact or transaction. That would be substituting that man's certificate for his testimony on the subject, and that is what this certificate does, and it simply shows what they have done; it is not a record or a copy of the record, but a statement of what has been done. If such a certificate as this could be offered we need not call any officer of the Government, he need only furnish a certificate, and we would not have any right of cross examination. It may not be at all as he states here, it may be his opinion or his conclusion, but if I were to bring out the facts it might be an entirely different conclusion your Honor would arrive at.

The REFEREE: I will admit it.

Exception by Mr. Kiernan.

Marked Plaintiff's Exhibit 6, Sept. 13, 1911, G. J. C.

Mr. CLASS: Will you stipulate, Mr. Kiernan, that since the commencement of this action the defendant, the New York Steam Fitting Company, have gone through bankruptcy?

Mr. KIERNAN: I know they have gone through bankruptcy, but whether it was before or since this action I cannot say. Has that any relevancy to the matter at all?

The REFEREE: I do not see any relevancy to it.

106 Mr. CLASS: The plaintiff renews the motion to amend paragraph XVI of the complaint so that it shall now read that no action or suit has been brought by the United States of America against the defendants, or either of them, within six months from the completion and final settlement of said contract, nor had one year elapsed since the performance and final settle-

ment of the contract by the defendant, New York Steam Fitting Company, prior to the commencement of this action.

Mr. KIERNAN: I object to the granting of the amendment, if your Honor please, on two grounds: In the first place, that the proposed amendment is not the statement of the fact, but a conclusion. It states that no action was begun by the United States within six months, and that this action was brought within the year. Your Honor sees that that is a mere conclusion. If they want to make an amendment they have got to amend their complaint so as to show the date of final settlement. Those are the decisions, as I understand it.

Decision reserved for the time being.

Mr. KIERNAN: I only just want to change my last motion where I moved to strike out Exhibit No. 1, I think it is, the advertisement, so as to include the striking out of the testimony of Mr. de Lisser.

I also withdraw the motion already made to amend my answer.

107 JOHN B. ACKERSON, recalled by plaintiff.

Direct examination by Mr. CLASS:

Q. Mr. Ackerson, when you last testified in this action you stated that you made inquiries of your foreman in the matter of ascertaining the creditors of the New York Steam Fitting Company. What information did you receive from Mr. Wallis, the foreman?

Mr. KIERNAN: Objected to as incompetent, irrelevant and immaterial and hearsay; Mr. Wallis was on the stand and testified.

The REFEREE: I think on a question of what creditors he knew of he can state what he was told.

Exception by Mr. Kiernan.

A. Mr. Wallis gave me a list of the creditors. Shall I state the list?

Q. Yes.

A. Herrmann & Grace, Peet & Powers, Cutler-Hammer, R. A. Keasbey Co., John Simmons Co., H. R. Worthington.

Cross-examination by Mr. KIERNAN:

Q. Was that all that was on the list, Mr. Ackerson?

A. That is all.

Q. You are quite sure about that?

A. I am.

Q. How long since you have seen that list?

A. Why, I saw it only to-day.

Q. And of course it was written?

A. No, sir, it was not.

108 Q. It was not a written list?

A. No.

Q. Then how do you call it a list if it was not written?

A. Why, yes, it was a written list, but it was not an old written list.

Q. What do you mean by it was not an old written list? When was the list made up?

A. Why, the list was made up sometime ago, and handed to our attorney.

Q. Was not that an old written list?

A. That was an old written list, yes.

Q. What was the list that you spoke about that you wrote to-day?

A. The list that I took from Mr. Wallis which I wrote to-day as a memorandum.

Q. How did you make up that list to-day?

A. Why, I wrote it.

Q. From dictation by Mr. Wallis?

A. No, not from dictation from Mr. Wallis.

Q. How did you make it up, then?

A. Why, I got the list of names from Mr. Class that I gave him.

Q. So Mr. Class told you over the phone, did he?

A. No, sir.

Q. He told you personally, then?

A. He told me personally, yes.

Q. You saw him personally to-day?

A. No, I did not.

Q. When did you see Mr. Class last?

109 A. Why, I do not just recall when I did see Mr. Class.

Q. When did Mr. Class give you the information by which you made up this list?

A. Some two or three weeks ago.

Q. And you had that in your mind then?

A. Yes, sir.

Q. And have carried it in your mind ever since?

A. Yes, sir.

Q. And you made up the list to-day?

A. Yes, sir.

Q. You said just a moment ago that Mr. Wallis gave you a list and that you were testifying from that list now, didn't you?

A. Why, I did not say Mr. Wallis gave me that list today.

Q. He gave you that list sometime ago?

A. Yes.

Q. And you are testifying from that list now?

A. I am testifying from that list in conjunction with the list that I got from Mr. Class.

Q. Will you swear positively what is in that list; in other words, do you mean to tell the Referee just what you have testified now constitutes all the names that are in that list?

A. The list that was given to me, yes, at that time.

Q. There were no other names on it?

A. The list was prepared by Mr. Wallis.

Q. There are no other names on it, are there?

A. No.

Q. Is the name Crane & Co. on that list?

A. Not that I can recall.

110 Q. Is the name Haynes, Jones & Cadbury on that list?
A. Not that I can recall.
Q. L. O. Koven on that list?
A. No, not that I can recall.
Q. If Mr. Wallis testifies they are on the list, is he mistaken?
A. It was not on the list Mr. Wallis gave me, or the list that I handed to Mr. Class.
Q. You are quite sure of that?
A. Yes, sir.
Q. Were the names of any other people than those you have given on that list?
A. Not that I can recall.
Q. These people on that list are what you call material men, are they not?
A. Yes.
Q. There were no labor men on that list at all?
A. No.
Q. Did you make any efforts to find out who was delivering material down on the New York Steam Fitting Company contract, and whether they were paid or not?
A. Only as I have stated.
Q. Through Mr. Wallis?
A. Through Mr. Wallis.
Q. And you know only what he told you?
A. I know only what he told me.
Q. And if he testifies he did not make any inquiry whether there were unpaid claims for labor or not, that applies to you, too, does it?
A. Yes.

111 Redirect examination by Mr. CLASS:

Q. Did you hand to me a memorandum of all the names that appeared on that list that Mr. Wallis handed to you?

Mr. KIERNAN: Objected to as incompetent, irrelevant and immaterial.
The REFEREE: I will allow it.
Exception by Mr. Kiernan.

Q. Yes, sir.

Mr. CLASS: I offer in evidence certain letters that I have received from The Title Guaranty & Surety Company, and also three letters which I addressed to them, as tending to prove that I was anxious to acquaint them with the situation from the start and to safeguard them against possible loss. I ask Mr. Kiernan to be kind enough to produce my letter of August 28, 1907, my letter of September 21, 1907, and my letter of October 16, 1907, addressed to The Title Guaranty & Surety Company, 277 Broadway, pursuant to my notice to produce.
Mr. KIERNAN: I did not produce them, Mr. Class, I did not know you would need them at this session. You can offer those copies subject to correction by the original if I received them. I have

not looked at my files. I will identify the one signed F. C.
112 Williams.

Mr. CLASS: The three letters are offered in evidence, subject to correction, if need be, after comparison with the originals.

The REFEREE: There ought to be some proof that those letters were written.

Mr. CLASS: I am going to testify now, your Honor, as to that.

113 GEORGE B. CLASS, a witness called in behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. CLASS:

I am the attorney for the plaintiff in this action. The three papers now offered in evidence, bearing date respectively August 28, 1907, September 21, 1907, and October 16, 1907, are correct copies of original letters which were sent by me to The Title Guaranty & Surety Company on or about those dates. The letter bearing the earlier date was addressed to The Title Guaranty & Trust Company of Scranton, Pa., prior to the changing of the name of the corporation.

Cross-examination by Mr. KIERNAN:

Q. Mr. Class, what was the date of the summons in this action?

A. November 2, 1908.

Q. That was the date the summons in this action was issued, was it?

A. Yes, sir.

Mr. KIERNAN: Now, if your Honor please, I object to the letters on the ground that they are incompetent, irrelevant and immaterial, and have no bearing on the issues in this matter.

The REFEREE: Will you state the purpose for which the letters are offered, Mr. Class?

Mr. CLASS: The letters are offered for the purpose of show-
114 ing that the plaintiff corporation was prompt in notifying the Bonding Company of the default in the payment of the moneys due and owing to the plaintiff, and were sent in recognition of what the plaintiff regarded as its duty to the defendant Bonding Company growing out of the liability of the latter to the former.

The REFEREE: Now, you object on what ground?

Mr. KIERNAN: I object on the ground that they are immaterial, irrelevant and incompetent and not bearing on any of the issues in this action, correspondence that was had with us nearly a year, and in one case more than a year, prior to the commencement of the action.

The REFEREE: I will rule that those are irrelevant and immaterial.

Mr. CLASS: I will take an exception, if your Honor please.

A paper is produced and marked Exhibit A, September 13, 1911, G. J. C.

It is conceded by both parties that Exhibit A of this date is a correct copy, so far as material, of the final voucher that was paid

by the United States to the New York Steam Fitting Company on account of contract for mechanical equipment of the New York Custom House, dated July 12, 1905.

115 Briefs to be served and exchanged between the parties on or before September 20th, and to be filed with the Referee on or before September 25th.

Adjourned, subject to the call of the Referee.

116 UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY

vs.

NEW YORK STEAM FITTING COMPANY et al.

NEW YORK, *October* 13, 1911.

Adjourned to Thursday, October 19, 1911, at 1 P. M.

NEW YORK, *October* 19, 1911.

Adjourned to Thursday, October 25, 1911, at 2 P. M.

117 UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY

vs.

NEW YORK STEAM FITTING COMPANY et al.

NEW YORK, *October* 25, 1911.

Present:

The Referee.

George B. Class, Attorney for Plaintiff.

Adrian T. Kiernan, Attorney for defendant The Title Guaranty & Trust Company of Scranton, Pa.

The REFEREE: I dispose of the pending motions as follows:

The plaintiff moves to amend paragraph XVI of the complaint by substituting the word defendants in place of the word "defendant" in the second line thereof.

Motion granted.

Defendants' exception noted.

Defendants' Motion to Strike Out.

According to the pleadings the defendant, the New York Steam Fitting Company, contracted to do certain work for the United States, in connection with the construction of a public building, and the other defendant, the Title Guaranty & Surety Company, gave the usual bond required by Chapter 778, 33 Stat. 811.

118 The plaintiff, the Alexander Bryant Company, was a subcontractor which furnished labor and materials going into the job, for which it has not been paid. It therefore, under the provisions of the statute, sues on the said bond.

The plaintiff has offered evidence of the publication of a notice to creditors, Pl'ff's Ex. 2, in the New York Press, beginning the 5th day of November, 1908, and continuing daily for twenty-one successive days, the last publication being made on the 25th day of November, 1911. The same was objected to and received with the privilege of subsequently moving to strike out.

Thereafter it was established that the date of final settlement between the United States and the New York Steam Fitting Company was the 19th day of February, 1908.

The defendant now moves to strike out all such evidence of publication as incompetent, irrelevant and immaterial, inasmuch as it failed to show publication under the order of the court or within the time limited by the statute.

The provision of the statute specially applicable is the following:

"Provided further, that in all suits instituted under the provisions of this act, such personal notice of the pendency of such suits, informing them of their right to intervene as the court may
119 order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

It is admitted that no court order was obtained specifying the kind of notice to be given creditors or giving directions as to publication.

The first question to be considered is whether a court order was necessary.

Two ways of giving notice are mentioned—"personal notice" and "notice of publication." "Notice of publication" must mean notice by publication, otherwise the expression is without sense. It seems fair to assume that the form of notice is to be the same whether given directly by personal service or indirectly by substituted service through a newspaper, otherwise some creditors might receive different information from that given to others. It also seems clear that the court must determine the character of the notice. The only doubt arises from the peculiar punctuation, "such personal notice of the pendency of such suits, informing them of their right to
120 intervene as the court may order, shall be given to all known creditors," &c.

The position of the commas might suggest that "as the court may order" qualifies "right to intervene" were it not for the word "such." Taking the whole sentence it seems to me necessary to hold that the meaning is such notice as the court may order shall be given, &c. If this is right and the form of notice published has to be the same as that served, in absence of a court order, the evidence failed to satisfy the statute.

In considering the second ground of objection, i. e. that the publication, even if otherwise correct, was not within the time limited by the statute, the claim of the defendant is that in this case "the time limited therefor" was one year from the final settlement, i. e. the 19th day of February, 1909, and that therefore any publication to satisfy the statute must be completed three months before that

date, i. e. by the 19th day of November, 1908, and have been begun at least three weeks earlier, whereas the publication shown did not begin until the 5th day of November and was not completed until the 25th day of November.

The statute provides for two classes of cases (*a*) Intervention by creditors in an action brought by the United States and (*b*)
121 An action by creditors when the United States does not sue. We need concern ourselves only with what relates to the latter.

Creditors can only take the initiative "if no suit shall be brought by the United States within six months from the completion and final settlement of the contract." The expiration of the six month period is a condition precedent to the right to sue. This is well expressed by the Circuit Court of Appeals, Third Circuit, in Stilzer vs. U. S., 182 Fed. Rep., 513.

"The lapse of six months was a condition precedent to the plaintiff's right to sue. In other words, a conditional cause of action only was conferred. Such cause of action was created by the Statute and must be instituted pursuant to the terms and conditions of the statute and not otherwise," &c.

Therefore neither the plaintiff nor any other creditor had any right against the bond until the expiration of six months from the 19th day of February, 1908, i. e. the 19th day of August, 1908.

The limitation of any right of creditors against the bond is thus fixed by the statute.

"When suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the com-
122 plete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later; and provided further, that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made a party thereto within one year from the completion of the work under said contract, and not later."

The right of intervention is limited to "one year from the completion of the work under said contract." The expression elsewhere used is "the performance and final settlement of said contract." The final settlement cannot be earlier than the completion of the work; it may be considerably later. Probably the two expressions were intended to be synonymous. For the present discussion it is enough to note that the right of intervention expired not later than one year from the final settlement.

The last publication of the notice informing creditors "of their right to intervene" must be at least three months before the time limited therefor." The word "therefor" must refer to the right of intervention. There is no other possible antecedent.

123 It seems to me, therefore, that the publication proved did not come within the time limit of the statute.

The motion to strike out the evidence regarding publication must be granted unless in some way the plaintiff was excused from complying with the statute.

This is claimed on two grounds; first, that it was the duty of the Surety Company to make the publication and, second, that even if it was originally plaintiff's duty, the performance was waived by the Surety Company.

To be sure the statute does not explicitly state who shall make the publication. A construction making it the duty of the plaintiff not only seems to me the more reasonable interpretation of the expressions used, but it makes the statutory procedure correspond with the general principles of equity practice. It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it and to do this in one action so as to prevent future litigation. For this purpose, as a condition precedent to the court taking any action, it lays upon the person initiating the proceeding the burden of affording all
124 others interested an opportunity to be heard either by joining them as parties or giving them notice so that they may, if they please, make application to be joined.

Daniell's Chancery Pleading and Practice, 190.

Story Equity Pleading, 72.

The plaintiff by making the publication evidently thought it had such duty and was quite right in such conclusion.

Whos-ever duty it was, if summoning all interested parties is jurisdictional, the court can take no action until it has been done by some one in the manner prescribed.

It appears that counsel for the defendant on November 21, 1908, signed the following consent:

"It is hereby consented on the part of defendants that defendants waive any failure on the part of plaintiff to notify creditors under the third proviso of the statute, provided no more such notices are sent."

It appears that prior to its execution plaintiff had personally served certain creditors with a notice in the form of Plaintiff's Exhibit 2. The defendants argue that the consent referred only
125 to the personal notices and had nothing to do with the publication. The concluding words "provided no more such notices are sent" would seem to indicate this as would also the fact that, notwithstanding the consent, the publication continued for several days later.

Be this as it may, I do not consider that the defendants had any power to dispense with the statutory notification to other creditors. If it was possible so to do, the bondsman might have a strong inducement to limit its liability by such a consent given to a small creditor who might be the first to sue, and a large creditor first suing would seek, by a stipulation with the Surety Company, to prevent other creditors coming in to share pro rata in the fund.

The giving of notice is not for the benefit of the surety company but for that of other creditors and the court. It would be absurd to hold that any agreement between the plaintiff and the surety

company could affect the rights of other creditors or prevent the court from controlling the procedure of the litigation.

The offering of this stipulation, therefore, does not excuse the plaintiff from producing jurisdictional proof in accordance with the terms of the statute.

126 As the proof of publication offered is not in compliance with the statute, the motion to strike it out is granted and plaintiff's exception noted.

Mr. KIERNAN: Mr. Referee, in view of your decision on the motion of the publication of notice, it would seem to me that no action upon the bond on which the Title Guaranty & Surety Company were surety, based upon the provisions of the Act of 1905, as this action is admittedly based upon, can now be maintained by the plaintiff. In order to avail itself of the provisions of that Act, which gives it purely statutory rights, it must have complied strictly with such provisions. Not having done so, the action cannot be maintained, and therefore I will urge upon your Honor that any evidence of proof offered or attempted to be offered by the plaintiff as to labor performed and materials furnished upon the Custom House under the contract of the New York Steam Fitting Company, for the performance of which the bond upon which my client, as surety, was given, will be irrelevant and immaterial for the reason that even if the plaintiff could give ample proof of the furnishing of such labor and material, it could not have any recovery under the Act of 1905, because it did not comply with the requirements of that

127 Act.

Mr. CLASS: If your Honor please, I now beg to offer evidence as to the work, labor and materials performed by the plaintiff as set forth in the complaint.

Mr. KIERNAN: I will object to any such evidence being received, Mr. Referee, on the ground, as I have already stated, it would be incompetent and immaterial. It is clearly shown they have no right to offer such evidence, that they have not brought themselves within the Act of 1905. As I take it, Mr. Class, you have no further proof to offer as regards the publication of any notice to creditors, as required by the Act of 1905.

Mr. CLASS: I have no further proof to offer.

Mr. KIERNAN: Then, Mr. Referee, in order not to put the plaintiff to useless expense in going on and proving the case, I ask for a ruling on your part that you would not receive from the plaintiff a tender in the regular way of any evidence showing labor performed and materials furnished by the plaintiff at the Custom House under the New York Steam Fitting contract for the purpose of recovering a judgment in this action against my client, the Surety Company, as surety upon the bond of the New York Steam Fitting Company; such recovery can only be had when the action is brought

128 under the Act of 1905, and it now affirmatively appears that the provisions of the Act of 1905 were not complied with.

The REFEREE: I rule, in view of the fact that I have held that the plaintiff has not complied with one of the conditions of the

statute, that evidence of the labor performed and materials furnished would be incompetent, irrelevant and immaterial.

Mr. CLASS: And I will take an exception to that ruling, if your Honor please.

Mr. KIERNAN: Mr. Class, have you any further proof to offer then that would come outside the ruling of the Referee?

Mr. CLASS: Under the circumstances, I rest.

Mr. KIERNAN: I move, Mr. Referee, to dismiss the complaint on the ground that no cause of action has been shown, especially that no cause of action, or the right to maintain this action under the Act of 1905 has been proved by the plaintiff.

The REFEREE: Motion granted on the second ground.

Mr. CLASS: Exception.

I hereby certify that the foregoing is a correct transcript of the testimony taken before me and of the whole thereof.

HENRY MELVILLE,
Referee.

(Endorsed:) U. S. Circuit Court, S. D. of N. Y., Filed Dec. 30, 1911, John A. Shields, Clerk.

129 PL'FF'S EX. 1. Aug. 1, 1911.

STATE OF NEW YORK,
City and County of New York,
Borough of Manhattan, ss:

Leicester de Lisser, being duly sworn, says that he is the Principal Clerk of the Publisher of The New York Press, a daily newspaper printed and published in the City of New York, Borough of Manhattan; that the advertisement hereto annexed has been regularly published in the said New York Press once a day for 21 successive days commencing on the 5th day of November, 1908 and ending upon the 25th day of November, 1908.

LEICESTER DE LISSER.

Sworn to before me this 14th day of Jan. 1909.

[SEAL.] H. D. HALSEY,
Notary Public, No. 25, for Kings Co.

Certificate filed in New York Co.

Circuit Court of the United States, Southern District of New York.

UNITED STATES OF AMERICA (for the Benefit of ALEXANDER BRYANT COMPANY), Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & TRUST COMPANY OF SCRANTON, PENNSYLVANIA, Defendants.

Pursuant to the requirements of an Act of Congress of August 13th, 1894, and of February 24th, 1905, amendatory thereof, no-

tice is hereby given to all creditors of the above named defendant New York Steam Fitting Company, under the contract between the plaintiff and the said last named defendant (and the co-defendant, as their surety) for work incident to the construction of the Custom House, that the above entitled action has been instituted upon the bond of the defendant contractor and against said surety, and that any creditor may file his claim in this action and be made a party herein as in said acts of Congress provided.

New York, October 16th, 1908.

GEORGE B. CLASS,
Attorney for Plaintiff,
156 *Fifth Avenue, Manhattan Borough,*
New York City, New York.

130 PL'FF'S EX. 2.

AUG. 1, 1911.

Circuit Court of the United States, Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & TRUST COMPANY OF SCRANTON, PENNA., Defendants.

Please take notice that the above named Alexander Bryant Company, has commenced an action in the name of the United States of America under the provisions of the Act of Congress of August 13th, 1894 (as amended by Act of Congress of Feb. 24th, 1905) to recover a judgment against the defendant, New York Steam Fitting Company and its surety The Title Guaranty & Trust Company of Scranton, Penna., for a sum of money alleged to be due and owing to the aforesaid Alexander Bryant Company for work, labor, materials and service furnished as sub-contractors under the contract and bond entered into by the New York Steam Fitting Company for the mechanical equipment of the new Custom House at New York City, New York, in which bond the defendant, The Title Guaranty & Trust Company of Scranton, Penna., is joined as surety.

As required by the express provisions of the aforementioned acts of Congress, and as one of the creditors of the New York Steam Fitting Company, under aforesaid contract, you are hereby notified of your right to intervene and be made an additional party plaintiff in this action, as the Court may order, so as to have the rights and claims of any and all existing creditors under said contract
131 and bond, adjudicated in one and the same action.

Dated New York, Nov. 2nd, 1908.

GEORGE B. CLASS,
Attorney for Plaintiff.

156 Fifth Avenue, Borough of Manhattan, N. Y. City, N. Y.

(Endorsed:) Notice under acts of Congress of August 13th, 1894, and Feb. 24th, 1905, and aff. of service on all known creditors. U. S. Circuit Court, Southern District of N. Y. Filed Dec. 30, 1911. John A. Shields, Clerk.

132 PL'FF'S EX. 3.

Circuit Court of the United States, Second Circuit in the Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and Another, Defendants.

It is hereby consented that defendants' time to move or plead herein be and the same hereby is extended to and to include December 16th, 1908; and

It is hereby consented on the part of defendants, that defendants waive any failure on the part of plaintiff to notify creditors under the third proviso of the Statute, provided no more such notices are sent.

Dated, New York, November 21, 1908.

GEO. B. CLASS,
Attorney for Plaintiff.
HARDY & SHELLABARGER,
Attorneys for Defendants.

(Endorsed:) U. S. Circuit Court, Southern District of N. Y. Filed Dec. 30, 1911. John A. Shields, Clerk.

133 PL'FF'S EX. 4.

SEPT. 13, 1911. H. M.

This agreement, made the ninth day of August in the year One Thousand Nine Hundred and Five, by and between Alexander Bryant Company of 1 Madison Avenue, New York City, hereinafter called the party of the first part, and the New York Steam Fitting Company, No. 137 Elm Street, New York City, party of the second part.

Witnesseth, that the party of the first part, in consideration of the fulfillment of the agreements herein made by the party of the second part, agrees with said party of the second part, as follows:

1. The party of the first part, under the direction and to the entire and complete satisfaction of the Architect of the Building, subject to the approval of the Supervising Architect, acting for the purpose of this contract as Agents of the Owner, shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by the said Architect for the plumbing work complete for the United States Custom

House building at New York City, N. Y., in strict accordance with the plans and specifications and as per proposal of the said party of the first part, dated August 9th, 1905, and our acceptance dated August 9th, 1905, copy of which is hereto attached and made part of this agreement, which drawings and specifications are identified by the signatures of the parties hereto.

2. The Architect shall furnish to the party of the first part, such further drawings or explanations as may be necessary to detail and illustrate the work to be done, and the party of the first part shall conform to the same as part of this contract so far as they
134 be consistent with the original drawings and specifications referred to and identified, as provided by Art. 1.

It is mutually understood and agreed that all drawings and specifications are and remain the property of the Architect.

3. No alteration shall be made in the work shown or described by the drawings and specifications, except upon a written order of the party of the second part, and when so made the value of the work added or omitted shall be computed by the Supervising Architect on the basis of the prevailing market rate of the material to be added or deducted.

4. The parties of the first part shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architect or his authorized respresentatives. He shall within twenty-four hours after receiving written notice from the party of the second part to that effect proceed to remove from the grounds or buildings all materials condemned by the Architect, whether worked or unworked, and take down all portions of the work which the party of the second part shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications.

5. Should the party of the first part at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architects the party of the second part shall be at liberty after two (2) days' written notice to the party of the first part, to provide any such labor or materials and to deduct
135 the cost thereof from any money then due or thereafter to become due to the party of the first part under his contract; and if the Architect shall certify that such refusal neglect or failure is sufficient ground for such action, the party of the second part shall also be at liberty to terminate the employment of the party of the first part for the said work and to enter upon the premises and to take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide materials therefor, and in case of such discontinuance of the employment of the party of the first part then the said party of the first part shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount

paid under this contract shall exceed the expense incurred by the party of the second part in finishing the work, such excess shall be paid by the party of the second part to the party of the first part, but if such expense shall exceed such unpaid balance, the party of the first part shall pay the difference to the party of the second part; the expense incurred by the party of the second part as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default shall be conclusive upon both parties hereto.

The party of the first part shall complete the several portions as indicated by the specifications for the early completion of the Post Office Section and the whole of the work comprehended in this agreement, on or before July 1st, 1906.

It is expressly covenanted and agreed by and between the parties hereto that time is, and shall be considered as of the essence
136 of this contract, on the part of the party of the first part, and in the event that the said party of the first part shall fail in the due performance of the entire work to be performed under this contract by, and at the time herein mentioned or referred to, serious loss and damage will be caused to the party of the second part, the precise extent of which might be difficult of estimation in money, the parties to this agreement do hereby mutually agree upon the sum of One Hundred ($100.00) Dollars per day to be paid by the party of the first part to the party of the second part for each day's delay in the completion of the said mentioned work beyond the said mentioned time as liquidated damages for such delay, the sum to be deducted from the final payment on account of this agreement.

7. Should the party of the first part be obstructed or delayed in the prosecution or completion of the said work by the act, neglect, delay or default of the party of the second part or the Architect or of any other Contractor employed by the party of the second part upon the work or by any damage which may happen by fire, lightning, earthquake or cyclone, or by the abandonment of the work, by employees through no fault of the party of the first part, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, but no such allowance shall be made unless a claim therefor is presented in writing to the party of the second part within twenty-four hours of the occurrence of such delay. The duration of such extension shall be certified to by the Architect.

8. The party of the second part agrees to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and the party
137 of the first part agrees that if they shall delay the material progress of the work so as to cause any damage for which the party of the second part shall become liable (as above stated) then the said party of the first part shall make good to the party of the second part any such damage. The amount of such loss or damage shall, in every case, be fixed and determined by the Architect, or by the arbitration as provided by Art. 3 of this contract.

9. It is hereby mutually agreed between the parties hereto that

the sum to be paid by the party of the second part to the party of the first part for the said work and material shall be Forty Nine Thousand ($49,000.00) Dollars, subject to additions and deductions as hereinbefore provided and that such sum shall be paid in current funds by the party of the second part to the party of the first part in instalments as follows: eighty-five per cent (85%) in instalments as hereinafter provided and fifteen per cent (15%) after the work hereunder is completed in every respect and after the receipt of a certificate to that effect, executed by the Architect in proper form. The eighty-five per cent (85%) hereinbefore agreed to be paid by instalments as the work progresses, shall be paid as follows:

Once in each month there shall be submitted to the party of the second part a certified statement showing how much work has actually been completed at the building and what proportion it is of the total work embraced in this contract.

When the Architect has examined and verified such statement and certified to its correctness as to the quantity of work done, and if there has been no default, payment in cash shall be made
138 by the party of the second part to an amount equal to eighty five per cent (85%) of the value of the work so completed as determined by such certificate and the contract price, after deducting the sum of all previous certificates on account thereof.

The remaining fifteen per cent (15%) is to be reserved until the final inspection, made upon the completion of the entire work and after the operating test has proved all the work to be satisfactory and in accordance with the specifications, after which final payment of the balance due will be made.

If at any time there shall be evidence of any lien, or claim, for which if established the party of the second part, or the said premises might become liable, and which is chargeable to the party of the first part, the party of the second part shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or claim, should there prove to be any such claim after all payments are made, the party of the first part shall refund to the party of the second part all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the default of the party of the first part.

10. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part and that no payment shall be construed to be an acceptance of defective work or improper materials.

11. It is mutually agreed that the party of the second part shall not in any manner be liable for personal injuries received by
139 any employee or employees of the party of the first part, nor for personal injuries received by any person or persons, caused by the acts or negligence of the party of the first part their agents or servants in the completion of the aforesaid work.

The party of the first part does hereby indemnify the party of the second part against all claims or demands which may or shall arise

by or on account of injuries received by any employee or other person caused as heretofore said.

12. It is further understood and agreed that the party of the first part shall furnish to the party of the second part prior to the first monthly payment, a schedule of quantities and unit prices which when carried out will give amounts aggregating the amount of this contract. These unit prices to be used as a basis for determining value of changes or omissions in the contract.

13. This agreement is made with strict reference to and in conformity with the agreement dated July 12th, 1905, for the mechanical equipment for the new Custom House in New York, N. Y., including boiler plant, steam piping and direct radiation, heating and ventilating, plumbing and electric wiring, conduits, switch boards, etc., made by and between the United States of America and the New York Steam Fitting Co., party of the second part hereto, a copy of which agreement is on file at the office of the New York Steam Fitting Co., No. 137 Elm Street, New York City and the Sub-Contractor hereby admits notice of the said agreement and of each and every stipulation and provision therein contained, and agrees to be bound thereby so far as the same may be applicable to the work herein agreed to be done and the materials herein agreed to be furnished as fully and completely as if each and every provision of said contract were herein particularly set forth.

140 14. It is understood and agreed that wherever the word Architect appears in this agreement it refers to the officer in charge of the work for the United States.

15. The said party for themselves, their heirs, executors, administrators and assigns do hereby agree to the full performance of the covenants herein contained.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

N. Y. STEAM FITTING CO [SEAL.]
HENRY L. HALL.
ALEXANDER BRYANT COMPANY. [SEAL.]
Per JOHN B. ACKERSON.

141

(Copy.)

AUGUST 9, 1905.

In re Plumbing—Custom House.

The New York Steam Fitting Co., No. 137 Elm Street, New York City.

GENTLEMEN: For the sum of *Fifty* Nine Thousand ($49,000.00) Dollars we will furnish and install the plumbing work complete in the New York Custom House in accordance with paragraphs 218 to 282 inclusive, and in accordance with paragraph 301½ for the temporary plumbing.

We will furnish a bond for the faithful performance of the work from a surety company in the sum of Twenty Four Thousand ($24,000.00) Dollars.

This proposition is based on the use of J. L. Mott fixtures. We will furnish promptly a detailed specification of these fixtures, giving the names and numbers, also of such other fixtures as we propose to use.

Yours very truly,

ALEXANDER BRYANT COMPANY.

142 All contracts subject to delays by strikes accidents or causes beyond our control.

Henry L. Hall, President.
Robert E. Hall, M. E., Secretary.
Burton P. Hall, M. E., Treasurer.

New York Steam Fitting Co.,
Steam & Hot Water Heating,
Ventilating Power Plants, High Pressure Piping.

Southern Division, 7 Clay St., Baltimore, Md.

137 ELM STREET, NEW YORK, *August 9th*, 1905.

In re Plumbing—Custom House.

The Alexander Bryant Co., No. 1 Madison Ave., New York City.

GENTLEMEN: We beg to accept your proposition for the plumbing work in the New York Custom House in accordance with your letter of August 9th.

As soon as we receive your detailed specification, we will prepare a contract and forward to you for your signature and bond.

Yours very truly,

NEW YORK STEAM FITTING CO.
HENRY L. HALL, *President*.

(Endorsed:) U. S. Circuit Court, S. D. of N. Y., Filed Dec. 30, 1911, John A. Shields, Clerk.

143 PL'FF'S EX. 5. Sept. 13, 1911. H. M.

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
WASHINGTON, *November* 26, 1910.

This is to certify that final payment was authorized by the Treasury Department on February 13, 1908, to be made to the contractors, The New York Steam Fitting Company, of the balance due under the contract entered into between the United States of America and said New York Steam Fitting Company, for the Mechanical Equipment of the new Custom House building in New York City.

It is further certified that no suit has been authorized by this Department to be instituted on the bond given in connection with

said contract, on which bond the Title Guaranty & Trust Company of Scranton, Pennsylvania, is surety.

It witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

[SEAL.]

A. PITT ANDREWS,
Assistant Secretary of the Treasury.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Dec. 30, 1911, John A. Shields, Clerk.

144 PL'FF'S EX. 6. Sept. 13, 1911. J. M. D.

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
WASHINGTON, *January* 11, 1911.

This is to certify that under date of February 3, 1908, Cass Gilbert, architect for the Custom-House building, New York, N. Y., reported the work satisfactorily completed under the contract entered into between the United States and the New York Steam Fitting Company for the Mechanical Equipment of said Custom House at New York, N. Y., except certain items of unfinished work which it was impracticable to complete at that time, and in order that final settlement with the contractor should not be delayed on that account a proposal to omit from the contract those items at a deduction of one thousand six hundred seventy dollars ($1,670.00) was accepted by the Treasury Department *of* February 10, 1908, and on February 13, 1908, final payment to the contractors, the New York Steam Fitting Company, of the balance due under their contract, was authorized to be made.

In witness whereof, I have hereunto set my hand and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

[SEAL.]

C. D. HILLES,
Assistant Secretary of the Treasury.

S. M. G.

(Endorsed:) U. S. Circuit Court, S. D. of N. Y., Filed Dec. 30, 1911, John A. Shields, Clerk.

145 EXHIBIT A.

Front of Check.

Treasury.

NEW YORK, N. Y., *Feb.* 19, 1908.

Assistant Treasurer of the United States, New York:

Pay to the order of New York Steam Fitting Co. Thirty seven thousand four hundred sixty four 38/100 Dollars, $37,464 38/100.

E. M. MORRIS,
Act'g Disb'g Ag't.

Custom House, New York.
n. v. running.
(Initials illegible.)
State subject for which drawn.
Collector, N. Y., E. S. Fowler.

146 Reverse Side.

This check must be endorsed on the line below by the person in whose favor it is drawn and the name must be spelled exactly the same as it is on the face of the check.

If endorsement is made by mark (x) it must be witnessed by two persons who can write giving their place of residence in full.

N. Y. STEAM FITTING CO.
HENRY L. HALL.
(Sign on this line.)

Pay to the order of Burton P. Hall, N. Y. Steam Fitting Co., Henry L. Hall, President.
Burton P. Hall, Geo. Huybills, Ass't Cash't.
Received payment, No. 23, Feb. 19, 1908.
Endorsement guaranteed.
Pacific Bank.
Paid New York, Feb. 20-08.

147 EXHIBIT B.

Appropriation: Custom House, New York, N. Y.; Building (state in full title of appropriation).

To New York Steam Fitting Company (name of payee), Dr.

Address:

147 La Fayette Street, (Street and number.) New York, (City or town.) N. Y. (State.)

Date of service. 1908.	Items.	Unit Price. Doll's. Cts.	Amount. Dollars. Cts.
Feb. 17.	Final voucher on account contract for Mechanical Equipment dated July 12, 1905, authorized by Department letter dated February 15, 1908, (P) signed by C. S. Kemper Assistant to Supervising Architect. Net Amount of contract per voucher dated Nov. 1, 1907		247,736.54
	Deduction Oct. 18, 1905	9.52	
	" Jan. 27, 1908	15.00	
	" Feb. 3, 1908	5.00	
	" Feb. 7, —	25.00	
	" Feb. 7, 1908	1,670.00	
			1,724.52
	Net amount of contract at date		246,012.02

[On left-hand margin:] Auditor advised as to Secretary's action in re liquidated damage clause, Feb. 17, 1908.

148 Less previous payments 208,547.64

Schedule (Proposals).

Certified as to correctness and value of service performed and of Jan. 28, 1908, approved for payment in the amount stated, viz: $37,464.38

No. —.

Paid Feb. 19, 1908.

CASS GILBERT,
Architect.

Total 37,464.38

(Certification and bill to be completely filled in by payee, or before signature by payee, without alteration or erasure at any time.)

I certify that the above bill is correct and just and that payment therefor has not been received.

N. Y. STEAM FITTING CO.
HENRY L. HALL, *President.*

$37,464.38.
(Not to be signed in duplicate.)

149 Building: U. S. Custom House. Location: New York, N. Y.

(Any notation made in spaces provided therefor on the back of this certificate become a part of this certificate.)

I certify that the above articles have been received by me in good condition, or the service performed as stated; that they were necessary for the public service; that the prices charged are just, reasonable, and in accordance with this agreement, and that they were secured in accordance with the agreement, and that they were secured in accordance with Section 1 and *A of the methods stated on the reverse hereof.

Approved for: —. Differences, if any show on back, No. 625.
R. A. GREENFIELD,
(Signature of Officer.)
Superintendent of Construction.
(Official designation.)

—— ——,
Assistant Secretary.

Feb. 19, '08.

150 Paid by check No. 346128, dated Feb. 19, 1908 on—at N. Y. in favor of —— ——, Cap., for $37,464.38.

*When voucher is certified in the name of a company or corporation, the name of the person writing the company or corporation name, as well as the capacity in which he signs, must appear.

Example: "Chicago Edison Company, per John Smith, Member of Firm" or Sec. or Treasurer, as the case may be.

Fill in from 1 to 4 as appropriate.

Fill in from A to *c* as appropriate.

2-2014.

E. M. MORRIS,
Disb'g Agt.

(Statement of account is annexed to original but omitted here as immaterial to this action.)

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed Dec. 30, 1911, John A. Shields, Clerk. Law 3-76.

151 U. S. Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA for the Use of ALEXANDER BRYANT COMPANY
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY &

CITY, COUNTY AND STATE OF NEW YORK, *ss:*

Henry Melville, the Referee appointed herein, by order of Hon. C. M. Hough, District Judge, made on the 31st day of March, 1911, being duly sworn, says that he will well and truly hear and determine the said cause and all the issues therein and report his determination thereon and otherwise perform the duty of Referee under said order according to the best of his ability.

HENRY MELVILLE.

Sworn to before me this 1st day of August, 1911.
[SEAL.]
CARL S. BROWN,
Notary Public, Kings County, N. Y.

Certificate filed in New York County, N. Y.

152 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA for the Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & SURETY COMPANY OF SCRANTON, PENNSYLVANIA, Defendants.

Report of Referee.

To the Honorable the Judges of the United States Circuit Court, Southern District of New York:

The undersigned, Henry Melville, to whom by order of Honorable Charles M. Hough, District Judge, bearing date the 31st day of March, 1911, the said cause and all the issues therein were referred to hear and determine same and to report his determination thereon, hereby reports as follows:

Before proceeding with the reference I took the oath hereto annexed.

There appeared before me George B. Class, Esq., attorney for the plaintiff, Adrian T. Kiernan, Esq., attorney for the defendant, The Title Guaranty & Surety Company of Scranton, Pennsylvania, and John J. Donovan, Esq., attorney for defendant, the New York Steam Fitting Company.

The reference proceeded with the taking of testimony on August 1, 1911, August 22, 1911, September 13, 1911 and October 25, 1911.

A complete transcript of such testimony is presented herewith. I also file herewith Plaintiff's Exhibits 1, 2, 3, 4, 5 and 6 and Exhibit A, being all the exhibits referred to in such testimony.

153 Upon such testimony and the exhibits therein referred to and all other proceedings herein, I make the following findings of fact and conclusions of law, viz:

Findings of Fact.

First. That the defendant, New York Steam Fitting Company, at all the times mentioned in the complaint, was a body corporate under the laws of the State of New Jersey.

Second. That the defendant, The Title Guaranty & Surety Company, at all the times mentioned in the complaint, was a body corporate, existing under the laws of the State of Pennsylvania; that its name originally was The Title Guaranty & Trust Company of Scranton, Pennsylvania, but on or about the 12th day of January, 1906, its corporate name was duly changed, according to law, to "The Title Guaranty & Surety Company", which has ever since been its name.

Third. That at all the times mentioned in the complaint, the use plaintiff Alexander Bryant Company, was a body corporate duly existing under the laws of the State of New York.

Fourth. That in an order made on the 15th day of March, 1909, by the Honorable Judge E. Henry Lacombe, of this Court, which was duly entered and filed on the same day, the name of the defendant, The Title Guaranty & Trust Company of Scranton, Pennsylvania, as it appeared in the original complaint herein, was ordered changed so as to read "The Title Guaranty & Surety Company".

Fifth. That on or about the 12th day of July, 1905, the defendant, New York Steam Fitting Company, entered into a contract in writing with L. M. Shaw, Secretary of the Treasury of the United States, for and on behalf of the United States of America, for the mechanical equipment of the New York Custom House at New York.

154 Sixth. That for the faithful performance of said contract the said defendant, New York Steam Fitting Company as principal, and said defendant, The Title Guaranty & Surety Company, as surety, executed and delivered on or about the 20th day of July, 1905, a bond to the United States of America, conditioned that the defendant, New York Steam Fitting Company, would, among other things, promptly make payment to all persons supplying it with labor and material in the prosecution of the work under the contract aforesaid. That such bond was accepted by the United States, and upon such acceptance the above mentioned contract was awarded to the defendant New York Steam Fitting Company.

Seventh. That the defendant, New York Steam Fitting Company, entered upon the performance of said work and on or prior to the 19th day of February 1908, duly completed the same and furnished all of the materials and performed all of the labor required to be furnished and performed according to the aforesaid contract.

Eighth. That final settlement on the said contract was duly made between the United States of America and the said New York Steam Fitting Company on the 19th day of February, 1908.

Ninth. That on or about the 9th day of August, 1905 the aforesaid use plaintiff Alexander Bryant Company, entered into an agreement in writing with the defendant, New York Steam Fitting Company, wherein and whereby the said Alexander Bryant Company agreed to completely provide all the materials and perform all the work mentioned in the specifications accompanying the first mentioned contract with the United States, and as shown on the drawings prepared by the architect of the building, so far as the plumbing work was concerned, in strict accordance with the said plans and specifications and drawings.

155 Tenth. That the said Alexander Bryant Company claims to have done certain work under the contract aforesaid, and also certain extra work, and alleges that certain sums remain due and unpaid to it.

Eleventh. That the bond given by the said defendant, New York Steam Fitting Company, as principal, and the defendant, The Title Guaranty & Surety Company, as surety, was given under the requirements of the Act of Congress of the United States known as Chapter 778, being 33 Stat. 811.

Twelfth. That the United States did not begin any action upon the bond so given as aforesaid, within six months after the performance and final settlement upon the contract between The New York Steam Fitting Company and the United States aforesaid, namely, did not begin any action within six months subsequent to February 19, 1908.

Thirteenth. That after the expiration of said six months, the use plaintiff The Alexander Bryant Company, attempted to begin this action, claiming to have an unpaid claim for labor and materials furnished in the prosecution of the work under the contract between the United States and the New York Steam Fitting Company aforesaid. That in and by said Act of Congress, it is, when any creditor begins an action upon the bond given upon a public work, required that:

"such personal notice of the pendency of such suits, informing them of their rights to intervene as the Court may order, shall be given to all known creditors, and in addition thereto, notice of publication in some newspaper of general circulation published in the State or Town where the contract is being performed for at least three

156 successive weeks, the last publication to be at least three months before the time limited therefor."

Fourteenth. That the use plaintiff herein, the Alexander Bryant Company, did not give such notice of publication, as required by said Act, although it did attempt to give such notification by publication; but the last publication of the same was not made at least three months before the time limited for creditors to intervene in this action.

Fifteenth. That the time limited for creditors to intervene in this action expired on the 19th day of February, 1909, and that the

last publication of notice to creditors was made by the use plaintiff three months prior thereto, to wit—on or before November 19, 1908; but such notices continued to be published thereafter until and including November 25, 1908; that such notice was not published for three weeks prior to said November 19, 1908.

Sixteenth. That on or about November 21, 1908, a stipulation was entered into between the attorney for the use plaintiff and the attorneys who then represented the defendants, New York Steam Fitting Company and The Title Guaranty & Surety Company (the latter defendant has since appeared, through substitution, by its present attorney) as follows:

"It is hereby consented on the part of the defendants that the defendants waive any failure on the part of plaintiff to notify creditors under the third proviso of the statute, provided no more such notices are sent."

157 Seventeenth. That the statute therein referred to is the said Act of Congress, Chapter 778 (33 Stat. 811) and the "third proviso" is that part of said act that provides for the giving of notice to creditors in the event that action on the bond is brought by a creditor, after the United States has failed to begin action for six months after performance of the contract and final settlement thereon.

Eighteenth. That at the time said stipulation was signed the use plaintiff had already given personal notice to certain creditors, but did not thereafter give any further personal notice to any creditor.

Nineteenth. That at and prior to the signing of said stipulation the use plaintiff was publishing in the New York "Press" a newspaper of general circulation in the city where the said contract between the New York Steam Fitting Company and the United States had been performed, a notice to creditors of the New York Steam Fitting Company, informing them of their right to intervene in this action.

That the said use plaintiff continued to publish such notice after the signing of such stipulation, to wit, on the 22nd, 23rd, 24th and 25th days of November, 1908.

Conclusions of Law.

I. That by reason of the use plaintiff herein not having given notice of publication to creditors within the time limited therefor, by the Act of Congress passed on the 24th day of February, 1905, being Chapter 778 (33 Stat. 811), it could not maintain this action against the defendants, The Title Guaranty & Surety Com-

158 pany and the New York Steam Fitting Company upon the bond given to secure the performance of the contract made on or about July 20, 1905, between L. M. Shaw, Secretary of the Treasury of the United States, and the New York Steam Fitting Company for the mechanical equipment of the New York Custom House.

II. That not having given the notice by publication to creditors as in the manner required by said Act, the said use plaintiff should

not be permitted to give evidence as to the amount of labor and materials alleged to have been performed by it under said contract, and as to the amounts therefor alleged by it to be unpaid.

III. That the use plaintiff not having brought this action upon the bond aforesaid in accordance with the requirements of said Act of Congress, the complaint herein should be dismissed.

IV. That the stipulation referred to in the finding of fact entitled "Sixteenth" was ineffective and void, in so far as it purports to relieve the use plaintiff of its obligations to comply in the bringing and conduct of this action with the terms of the act aforesaid.

V. Judgment should therefore be entered in favor of The Title Guaranty & Trust Company and the New York Steam Fitting Company as against the plaintiff herein, dismissing the complaint with costs and disbursements of this action.

VI. That judgment be and the same hereby is accordingly directed.

Dated, New York, December 26, 1911.

HENRY MELVILLE, *Referee.*

(Endorsed:) U. S. Circuit Court, S. D. of N. Y., Filed Dec. 30, 1911, John A. Shields, Clerk.

159 PLAINTIFF'S EX. 7.

H. M., Referee.

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & SURETY COMPANY, Defendants.

Please take notice that upon the annexed exceptions to the findings of Henry Melville, Esq., the Referee herein, and the affidavit of Geo. B. Class, Esq., verified the 23rd day of January, 1912, the plaintiff will move before the said Referee at his office 32 Nassau Street, Manhattan Borough, New York City, New York, on the 26th day of January, 1912, at 2 P. M. of said day, for a new trial, upon said exceptions and upon all the grounds set forth in Sec. 999 of the Code of Civil Procedure of the State of New York.

Dated New York, January 23rd, 1912.

GEO. B. CLASS,
Attorney for Plaintiff.

156 Fifth Avenue, Borough of Manhattan, N. Y. City, N. Y.

To Adrian T. Kiernan, Esq., 141 Broadway, N. Y. City, N. Y., Attorney for Def't The Title Guaranty & Surety Company.

To Messrs. Hardy & Shellabarger, Attorneys for Def't New York Steam Fitting Company, 30 Church Street, New York City, N. Y.

160 *Plaintiff's Exceptions to Finding of Referee.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & SURETY COMPANY, Defendants.

Be it remembered that this action at law was brought by the use-plaintiff to recover for labor and materials furnished as a sub-contractor under the provisions of the Act of Congress of August 13, 1894 (28 Stat. 278) as amended by Act of Feb. 24, 1905 (33 Stat. 811) " an Act for the protection of persons furnishing materials and labor for the construction of public works."

Be it further known that upon the written consent of the parties and an order entered thereupon April 3, 1911, and signed by Mr. Justice Hough f the United States Circuit Court of this District, the trial of the issues in the above entitled cause was referred to Henry Melville, Esq., of 120 Broadway, New York City, New York, to hear and determine the same and to report to said Court, and that upon the filing of the report, judgment might be entered in conformity therewith, as if said cause had been heard before the said Court. That said cause accordingly came on to be heard before the said Referee, August 1st, 1911, and upon subsequent dates to and including October 25, 1911, the use-plaintiff appearing by George B. Class, Esq., its counsel, the defendant, The Title Guaranty & Surety Company, appearing by Adrian T. Kiernan, Esq., its counsel, and the defendant, New York Steam Fitting Company, appearing by John J. Donovan, Esq., of counsel.

161 I.

Be it further known that upon the trial before said Referee, the plaintiff offered the testimony of Mr. de Lisser, advertising auditor of the New York Press, in proof of the publication of Notice to Creditors in said newspaper for twenty-one successive days, commencing November 5, 1908, and ending upon November 25, 1908. Both parties having conceded Exhibit "A" to be a correct copy, so far as material, of the final voucher that was paid by the United States to the New York Steam Fitting Company on account of the Mechanical Equipment of the Custom House, which Exhibit shows final payment was made February 19th, 1908, the defendant moved to strike out the testimony of Mr. de Lisser of the New York Press and plaintiff's Exhibit 1, (a copy of the advertisement or notice to creditors) on the alleged grounds that there is no proof that any such publication was ordered by the Court, on the further alleged ground that as the Act of Congress (33 Stat. 84) under which the action was brought provides that the publication of such a notice

must expire three months before the end of the year after the final completion of the contract, the publication was published over the time allowed by the statute.

The Act of Congress under which the action was brought is as follows:

Act of Congress, August 13, 1894 (28 Stat. 278) as amended by Act of February 24th, 1905, (33 Stat. 811).

An Act for the protection of persons furnishing materials and labor for the construction of public works.

"That hereafter any person or persons entering into a formal contract with the United States, for the construction of any public building, or the prosecution and completion of any public work,
or for repairs upon any public building or public work, shall
162 be required before commencing such work, to execute the
usual penal bond with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States, on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject however to the priority of the claim and judgment of the United States. If the full amount of the liability of the Surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners.

If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials, shall, upon application therefor and furnishing affidavit to the Department under the direction of which said work has been prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be and are hereby authorized to bring suit in the name of the United States in the Circuit Court of the United States in the
district in which said contract was to be performed and
163 executed, irrespective of the amount in controversy, in such
suit, and not elsewhere, for his or their use and benefit against said contractor and his sureties and to prosecute the same to final judgment and execution:

Provided that where suit is instituted by any of such creditors on the bond of the contractor, it shall not be commenced until after the complete performance of said contract and final settle-

ment thereof, and shall be commenced within one year after the performance and final settlement of said contract and not later:

And provided further that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the competion of the work under said contract and not later. If the recovery on the bond should be inadequate to pay the amount found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into Court for distribution among said claimants and creditors the full amount of the sureties' liability, to wit: The penalty named in the bond less any amount which said surety may have had to pay to the United States by reason of the execution of said bond and upon so doing the surety will be relieved from further liability:

Provided further that in all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the Court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or Town where the contract is being performed, for at least three successive weeks, the last publication to be at
164 least three months before the time limited therefor."

Against plaintiff's contention (*a*) that the statute should be construed as permitting the commencement of a sub-contractors' action at any time within the last six months of the year next following performance and final settlement (as expressly provided in the first proviso of the Act) (*b*) that if the creditors' action might be commenced at any time during the last six months of said year and if the notice to creditors both personal and by publication is a necessary statutory requirement, it necessarily follows that said notice may be commenced e. g. on the last day of the year next following "performance and final settlement" and may of necessity continue beyond said year under the requirement that the notice by publication shall continue for three successive weeks and that in consequence of this apparently necessary interpretation of the Statute the said proof of publication came within the statutory requirements (*c*) that the statute does not indicate whose duty it is to serve and publish said notices, and (*d*) that in view of the ambiguity of the statute in respect of its time provisions and because of its remedial character it should be construed most liberally in favor of the use-plaintiff-material men in order to effectuate and not defeat on any technicality the evident legislative intent:—against these contentions the Court thereupon ruled that "as the proof of publication offered is not in accordance with the statute, the motion to strike it out is granted," to which plaintiff duly excepted, which exception was duly allowed.

II.

Be it further known that the plaintiff offered in evidence a stipulation entered into between the plaintiff's attorney and

165 the former attorneys for the two defendants, which bears date November 21, 1908, and reads as follows:

"United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & SURETY COMPANY OF SCRANTON, PENNSYLVANIA, Defendants.

It is hereby consented on the part of the defendants that the defendants waive any failure on the part of the plaintiff to notify creditors under the third proviso of the statute provided no more such notices are sent.

Dated, New York, Nov. 21, 1908.

GEORGE B. CLASS,
Attorney for Plaintiff.
HARDY & SHELLABARGER,
Attorneys for Defendants."

To this the defendants' counsel objected on the ground that it was incompetent, irrelevant, and immaterial, and not binding upon the defendant, The Title Guaranty & Surety Company, that such a stipulation is in legal fraud of creditors. Against the objection of the plaintiff, that the defendants were estopped from avoiding the consequences of said stipulation, as affecting their liability under the bond; that they could not be found to have been prejudiced thereby; that the stipulation having been induced by them for use as a shield, it could not be now used as a club against the party at whose hands they obtained the stipulation; that no creditor had been shown to have been injured by said stipulation; and that it was not entered into until after the plaintiff had in good
166 faith served all known creditors; against these objections offered on behalf of the plaintiff, the Referee thereupon ruled that the "offering of this stipulation does not excuse the plaintiff from producing jurisdictional proof in accordance with the terms of the statute" to which the plaintiff's counsel duly excepted, which exception was duly allowed.

III.

Be it further known that the use-plaintiff, the Alexander Bryant Company, excepts to the decision of the Referee wherein he holds as follows: "I rule in view of the fact that I have held that the plaintiff has not complied with one of the conditions of the Statute, that evidence of the labor performed and materials furnished would be incompetent, irrelevant and immaterial" to which ruling the plaintiff then and there excepted, which exception was duly allowed.

IV.

Be it further known that the use-plaintiff, the Alexander Bryant Company, excepts to the decision of the Referee whereon he granted

the defendant Surety Company's motion "to dismiss the complaint on the ground that no cause of action or the right to maintain this action under the Act of 1905 has been proved by the plaintiff" the Referee having granted the motion on the second ground, to which ruling the plaintiff then and there duly excepted, which exception was duly allowed.

V.

Be it further known that the use-plaintiff, the Alexander Bryant Company, excepts to the refusal of the Referee to admit as evidence certain correspondence which passed between the plaintiff's attorney and the defendant Surety Company, said correspondence having been offered by plaintiff to show that the plaintiff was prompt in notifying the defendant Bonding Company of the default in the payment of the moneys due and owing to the plaintiff and were sent in recognition of what the plaintiff regarded as its duty to the defendant bonding company growing out of the liability of the latter to the former. Upon the objection of defendants' counsel as to their immateriality, irrelevancy, and incompetency, of the evidence, the Referee ruled that the letters were irrelevant, and immaterial, to which the plaintiff duly excepted and his exception was allowed.

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VI.

Be it further known that the use-plaintiff, Alexander Bryant Company, excepts to that part of the decision of the Referee wherein he holds as a conclusion of fact "that the use-plaintiff herein, Alexander Bryant, Company, did not give such notice of publication as required by said Act * * * the last publication of the same was not made at least three months before the time limited for creditors to intervene in this action. That the time limited for creditors to intervene in this action expired on the 19th day of February, 1909, and that the last publication of notice to creditors was not made by the use-plaintiff three months prior thereto, to wit: on or before November 19, 1908; but such notices continued to be published thereafter until and including November 25, 1908; that such notice was not published for three weeks prior to said November 19, 1908."

VII.

Be it further known that the use-plaintiff, Alexander Bryant Company, excepts to the decision of the Referee wherein he holds as conclusions of law (*a*) that by reason of the alleged failure of the use-plaintiff to give notice within the time limited therefor by the Act of Congress it could not maintain this action against the defendants upon the bond (*b*) That not having given the notice by publication in manner as required by said Act the said use-plaintiff should not be permitted to give evidence as to the amount of labor and materials alleged to have been performed by it under said contract, (*c*) That the use-plaintiff not having

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brought this action in accordance with the requirements of said Act, complaint should be dismissed (*d*) That the stipulation entered into between the attorneys of the parties herein, in so far as it purports to relieve the use-plaintiff of its obligations to comply with the terms of the Act is ineffectual and void, and (*e*) that judgment should be entered in favor of the defendants as against the plaintiff dismissing the complaint with costs and disbursements.

And the plaintiff prays that this its bill of exceptions may be allowed, settled and sealed.

Dated, New York, January 23rd, 1912.

GEORGE B. CLASS,
Counsel for Plaintiff.

156 5th Avenue, New York City, N. Y., Boro. Manhattan.

Settled and allowed this — day of ——, 1912.

—— ——, *Judge.*

169 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & SURETY COMPANY, Defendants.

STATE OF NEW YORK,
County of New York, ss:

George B. Class, being duly sworn says that he is the attorney for the plaintiff herein.

That he has this day consulted the records and files of the United States District Court for the Southern District of New York, and he finds that no judgment has been entered herein.

GEO. B. CLASS.

Sworn to before me this 23rd day of January, 1912.
[SEAL.]
I. D. MORRISON,
Notary Public, No. 122, New York Co.

(Endorsed:) Exceptions, Affidavit and Notice of Motion for new trial. Copy received Jan'y 22 12. A. T. Kiernan Att'y &c. Hardy & Shellabarger, Att'y for Def't N. Y. Steam Fitting Co. U. S. District Court, S. D. of N. Y., Filed Feb. 5, 1912.

170 *Supplemental and Final Report of Referee.*

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY

vs.

NEW YORK STEAM FITTING COMPANY et al.

NEW YORK, *Feb. 2nd,* 1912.

Present:
The Referee.
George B. Class, Attorney for Plaintiff.

The Referee states that on January 23, 1912, plaintiff's attorney served upon him motion papers consisting of exceptions to his findings herein, the affidavit of George B. Class, attorney for plaintiff, and Notice of Motion returnable January 26, 1912 at 2 P. M. of said day, for a new trial upon said exceptions, and upon all the grounds set forth in § 999 of the Code of Civil Procedure of the State of New York; and it appearing to my satisfaction therefrom, that no judgment had yet been entered herein, upon the ex parte application of the plaintiff's attorney, I signed and delivered to him for service forthwith upon the attorneys for the defendants, an order directing, that the time for entering judgment herein, be extended for the period of five days, next following the determination of said motion; and further directing and ordering that all other proceedings
171 meanwhile be stayed until the decision of said motion.

That on the aforesaid 26th day of January 1912, at 2 P. M. of said day, the defendants' attorneys not appearing, the plaintiff's attorney who appeared herein, offered in evidence a copy of the said moving papers and a copy of said order with admission of service endorsed thereon under date January 23rd, 1912, by Adrian T. Kiernan, Esq., attorney for the Title Guaranty & Surety Company and by Hardy & Shellabarger, Attorneys for the defendants, New York Steam Fitting Company. The plaintiff's attorney also offered in evidence the said last mentioned motion papers and copy of the said order and they were received in evidence by the Referee and marked respectively, plaintiff's Exhibits 7 and 8. The plaintiff then moved, that, as the written exceptions to the Referee's report, as incorporated in the moving papers of the motion for a new trial, are substantially the same as those verbally made before him prior to the filing of the said report, *that* said written exceptions be now accepted and filed with the Referee as of December 30, 1911, nunc pro tunc.

Plaintiff's motion is granted upon the ground that the Referee's report and findings were made with reference to plaintiff's said exceptions, as orally presented, in form substantially as now presented in writing.

The plaintiff moved for a new trial upon the said exceptions filed herein and upon all of the grounds set forth in Section 999
172 of the Code of Civil Procedure of the State of New York.

Plaintiff's motion is denied and he is allowed his exception to said ruling.

The Referee directs the plaintiff's attorney and the latter agrees to prepare for the signature of the Referee and to serve upon the respective attorneys for the defendants not later than February 3rd, 1912, a copy of an order denying plaintiff's motion for a new trial, and to return to the Referee the said order with defendants' attorneys' admission of service endorsed thereupon, or affidavit of service.

The Referee further directs the plaintiff's attorney and the latter agrees to file at once with the Clerk of the United States District Court, this supplemental report, together with the plaintiff's exhibits 7 and 8, plaintiff's exceptions, to the Referee's report, and the order denying plaintiff's motion for a new trial.

The foregoing, together with the Report filed herein Dec. 31, 1911, constitute the entire proceedings held before the Referee herein and concludes the reference.

HENRY MELVILLE, *Referee.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Feb. 5, 1912.

173 PLAINTIFF'S EX. 8.

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,

against

NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & SURETY COMPANY, Defendants.

It appearing from motion papers this day served upon me by George B. Class, Esq., counsel for the plaintiff herein, that he intends to move for a new trial upon exceptions to my findings as Referee herein, and my report herein having been filed December 31, 1911, prior to the date as of which the United States Circuit Court for this district was abolished, and no judgment having yet been entered herein,

Now upon the application of George B. Class, Esq., counsel for the plaintiff, it is hereby

Ordered that the time for the entering of judgment herein be and the same is hereby extended for the period of five days next following the determination of said motion, and all other proceedings are meanwhile stayed until the decision of said motion.

Dated, New York, January 23rd, 1912.

HENRY MELVILLE, *Referee.*

To Adrian T. Kiernan, Esq., Attorney for Def't Title Guaranty & Surety Company, 141 Broadway, New York City, N. Y.; Messrs. Hardy & Shellabarger, Attorneys for Def't New York Steam Fitting Co., 30 Church Street, N. Y. City, N. Y.

174 Service of a copy of the within is hereby admitted. Dated Jan'y 23, 1912.

A. T. KIERNAN,
Attorney for Def't T. G. & S. Co.
HARDY & SHELLABARGER,
Att'ys for Def't N. Y. Steam Fitting Co.

U. S. District Court, S. D. of N. Y. Filed Feb. 5, 1912.

175 *Order Denying Motion for New Trial.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & SURETY COMPANY, Defendants.

On reading and filing herein the affidavit of George B. Class, verified January 23rd, 1912; plaintiff's exceptions to the findings of the Referee herein; and the notice of motion herein, with defendants' attorneys' admission of service endorsed thereon under date of January 23rd, 1912; offered by the plaintiff herein in a motion for a new trial upon the said exceptions, and upon all of the grounds set forth in §999 of the Code of Civil Procedure of the State of New York, and an order having issued herein by me upon the ex parte application of the plaintiff's attorney based upon said motion papers, directing that the time for the entering of judgment herein be extended for the period of five days next following the determination of said motion, and meanwhile staying all proceedings herein; now after due deliberation it is

Ordered: That the plaintiff's motion for a new trial be and the same is hereby denied, and it is further

Ordered: That the plaintiff be and he hereby is directed to serve within two days, a copy of this order upon the attorneys for the defendants herein.

Dated, New York, February 2d, 1912.

HENRY MELVILLE, *Referee.*

176 (Endorsed:) Service of a copy of the within order is hereby admitted. Dated February 3, 1912. Adrian T. Kiernan, Attorney for Def't T. G. & S. Co. U. S. District Court, S. D. of N. Y.. Filed Feb. 5, 1912.

177 *Judgment.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY and Surety Company, Defendants; Peet & Powers and Hermann & Grace, Intervening Creditors.

This case having come duly on for trial in the United States Circuit Court, for the Southern District of New York, before Hon. Charles M. Hough, United States District Judge, and the use plaintiff, the Alexander Bryant Company, having appeared by George B. Class, its attorney, and the defendant the Title Guaranty and Surety Company having appeared by Adrian T. Kiernan, its attorney, and the intervening creditor Hermann & Grace, having appeared by Phillips & Avery, Esqrs., its attorneys, and no other party appearing at said trial, and it appearing that prior to such trial, this action was discontinued as regards the intervening creditor Peet & Powers, and the said parties so appearing upon said trial and each and all of them consenting to an order referring this cause, and the issues herein to Henry Melville, Esq., attorney and counselor at law, to hear and determine the same and to report his determination thereon to said Court with all convenient speed, and that upon the filing of said referee's report with the Clerk of said Court, judgment should be entered in conformity therewith as if such case had been heard before the Court; and an order to such effect having been duly made by said Charles M. Hough, District Judge
178 of the United States for the Southern District of New York, on March 31st, 1911; and entered in the office of the Clerk of said United States Circuit Court for the Southern District of New York, on April 3rd, 1911; and on or about the 11th day of April, 1911, an order having been made herein by Hon. E. H. Lacombe, United States Circuit Judge, discontinuing the above entitled action as against the Title Guaranty and Surety Company and Hermann & Grace, without costs to either party as against the other and such order having been entered in the office of the Clerk of said Court on the same day; and the above named use plaintiff Alexander Bryant Company and the defendant New York Steam Fitting Company and the Title Guaranty and Surety Company having thereafter appeared before said Henry Melville, Esq., the said Referee and the use plaintiff the Alexander Bryant Company having submitted its proofs and the said defendant the Title Guaranty and Surety Company having moved that the complaint of the use plaintiff be dismissed with the costs and disbursements of the action, and the said referee having thereafter made and filed his report in the office of the Clerk of the United States Circuit Court for the Southern District of New York, on the 30th day of December, 1911,

wherein he directed that the said complaint of the use plaintiff the Alexander Bryant Company be dismissed with the costs and disbursements of said action; and said use plaintiff having moved for a new trial, upon the exceptions filed by it with the said referee, and the said referee having on February 2nd, 1912, by an order dated on said day, denied said motion and having on February 5th, 1912, filed a supplemental report in the office of the Clerk of this Court,

Now, therefore, by virtue of the power and authority vested therein, this Court does hereby order, adjudge and decree that the complaint herein of the use plaintiff the Alexander Bryant
179 Company be dismissed with costs and disbursements of this action to the defendant the Title Guaranty and Surety Company; and it is further ordered, that the said use plaintiff Alexander Bryant Company pay to the defendant, the Title Guaranty and Surety Company, its costs and disbursements in this action, which have been taxed at the sum of one hundred sixty and 35/100 Dollars, and that said defendant have execution for said sum so taxed as costs.

THOS. ALEXANDER,
Clerk United States District Court,
Southern District of New York.

(Endorsed:) Judgment.—U. S. District Court, S. D. of N. Y., Filed Apr. 20, 1912, 11:50 A. M.

180 District Court of the United States, Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & SURETY COMPANY, Defendants.

Certificate.

Certificate by the Hon. Learned Hand, one of the Justices of the District Court of the United States for the Southern District of New York, Second Circuit, hereby certifies to the Supreme Court of the United States, that the issues in the above entitled action were by stipulation and consent referred to Henry Melville, Esq., as Referee, to try said cause. The stipulation provided that judgment might be entered upon his decision as if the cause had been tried before the Court and jury.

That pursuant to said stipulation the action came on for trial before the said Referee on the 1st day of August 1911.

The action was brought by the plaintiff, a sub-contractor, to recover for material and labor, and upon the bond of the defendant contractors and the defendant surety company, given pursuant of the Act of Congress, Feb. 24, 1905, entitled "An Act for the protection of persons furnishing materials and labor for the construc-

tion of public works" (33 Statutes at Large 811 Chap. 778), the plaintiff as a subcontractor having furnished material and labor in connection with the construction of the United States Custom House, New York City, New York.

181 That at the trial before the Referee, the plaintiff adduced evidence of the publication of a notice to creditors (plaintiff's exhibit 2) in the New York Press, beginning the 5th day of November, 1908, and continuing daily for twenty-one successive days, the last publication being made on the 25th day of November, 1911. The same was objected to and received with the privilege of subsequently moving to strike it out.

Thereafter, it was established that the date of final settlement between the United States and the New York Steam Fitting Company was the 19th day of February, 1908. It was admitted that no Court order was obtained. That plaintiff also offered in evidence the following stipulation and consent signed by the then attorneys for both defendants, under date of November 21st, 1908:

"It is hereby consented on the part of defendants, that the defendants waive any failure on the part of plaintiff to notify creditors under the third proviso of the Statute, provided no more such notices are sent."

That prior to its execution, plaintiff had personally served all known creditors with notice in the form of plaintiff's Exhibit 2. (The notice by publication, however, continued for the full twenty-one days to and including November 25, 1908.)

Upon this state of the case, the defendant Surety Company moved to strike out all evidence of publication upon the ground that it failed to show publication under order of the Court or within the time limited by the Statute. Defendant's motion was granted. The learned referee decided that the Court was without jurisdiction to proceed, that "Whosever duty it was, if summoning all interested parties is jurisdictional, the Court can take no action until

182 it has been done by some one in the manner prescribed. * * * The offering of the stipulation therefore does not excuse the plaintiff from producing jurisdictional proof in accordance with the terms of the Statute." He further held that "As proof of publication offered is not in compliance with the statute, the motion to strike it out is granted" to which plaintiff duly excepted. That upon the plaintiff offering to introduce evidence as to labor performed and materials furnished, the learned referee decided as follows: "I rule in view of the fact that I have held that the plaintiff has not complied with one of the conditions of the Statute that evidence of the labor performed and materials furnished would be incompetent, irrelevant and immaterial."

Thereupon, the defendant surety company moved to dismiss the complaint upon the ground that no cause of action or the right to maintain this action under the Act of 1905 had been proved by the plaintiff. The motion was granted.

That thereafter and on the 2nd day of February, 1912, on notice to the defendants, and upon all the grounds set forth in §999 of the Code of Civil Procedure of the State of New York, and upon plain-

tiff's exceptions to the findings of the referee (served as part of the moving papers) the plaintiff made a motion before the referee for a new trial, which was denied, to which exception was duly taken.

That thereafter and on the 20th day of April, 1912, a final judgment was entered in favor of the defendant surety company, dismissing the complaint with costs.

I further certify that the plaintiff has filed in this Court, its petition praying that a writ of error may issue out of the Supreme Court of the United States under the provisions of §238 of the Judicial Code to review said judgment, and an order allowing such
183 writ of error has been entered.

I therefore, in accordance with the provisions of §238 of the Judicial Code, being the Judiciary Act of Congress of the United States, approved March 3, 1911, hereby certify to the Supreme Court of the United States, that the jurisdiction of the Court over the persons and subject matter in this action is in issue, and that the following question of jurisdiction is certified to the Supreme Court of the United States for decision:

The question whether, in an action, brought under the Act of Congress of February 4th, 1905 (33 Stat. at Large 811 Chap. 778 entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works) by a sub-contractor against the contractor and his surety to recover on the bond of the said contractor and surety, given to secure payment for the material and labor furnished in the construction of public works, the Court has jurisdiction to proceed with the trial of said action between said parties, under the following circumstances, considered with reference to the provisions of said Act of Congress of Feb. 4th, 1905: (*a*) Where the date of completion and final settlement with the United States was February 19th, 1908; (*b*) where the publication of a notice (in form as in plaintiff's "Exhibit 2") notifying all creditors of their right to intervene, was commenced in the New York Press Nov. 5th, 1908 and was continued daily for twenty-one days to and including November 25th, 1908; (*c*) where no order of the Court was obtained with reference to said notice of publication; (*d*) where after all known creditors had been personally served by plaintiff with notice of their right to intervene in the action instituted
by the plaintiff, the defendants by their then attorneys, stipu-
184 lated and consented as follows: "It is hereby consented on the part of defendants, that the defendants waive any failure on the part of plaintiff to notify creditors under the third proviso of the Statute, provided no more such notices are sent" and whether under these circumstances the defendant surety company's motion to dismiss the complaint for want of jurisdiction should have been granted.

Dated, New York, Nov. 12th, 1912.

LEARNED HAND,
United States District Judge.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Nov. 12, 1912.

185 *Assignments of Error.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff in Error,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & SURETY COMPANY, Defendants in Error.

Comes now the plaintiff above named, by George B. Class, their attorney, and files the following assignment of errors, upon which they will rely upon their appeal to the Supreme Court of the United States from the judgment entered by this Honorable Court on the 20th day of April, 1912, in the above entitled cause:

The errors assigned in said decision and judgment are as follows:

I.

In striking out the testimony of Mr. de Lisser, advertising auditor of the New York Press, given in proof of the publication therein of notice to creditors, required to be given by the provisions of the Act of Congress of August 13th, 1894, as amended by Act of Congress of February 24th, 1905, under which this action was brought.

II.

In striking out, on defendant's motion, the following stipulation after having received the same when offered in evidence by the plaintiff:

"United States Circuit Court, Southern District of New York.

186 UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & SURETY COMPANY OF SCRANTON, PENNSYLVANIA, Defendants.

It is hereby consented on the part of the defendants that the defendants waive any failure on the part of the plaintiff to notify creditors under the third proviso of the statute provided no more such notices are sent.

Dated, New York, Nov. 21, 1908.

GEORGE B. CLASS,
Attorney for Plaintiff.
HARDY & SHELLABARGER,
Attorney for Defendants."

III.

In refusing to receive plaintiff's evidence of labor performed and material furnished, upon the following ruling: "I rule in view of the fact that I have held that the plaintiff has not complied with one of the conditions of the Statute, that evidence of the labor performed and materials furnished would be incompetent, irrelevant and immaterial."

IV.

In granting defendants' motion to dismiss the complaint on the ground that "no cause of action or the right to maintain this action under the Act of 1905 has been proved by the plaintiff."

V.

187 In the refusal of the Referee to admit as evidence, certain correspondence which passed between plaintiff's attorney and the defendant surety company, which was offered to show that the plaintiff was prompt in notifying the defendant surety company of the defaults in payment of moneys due and owing to the plaintiff by the defendant New York Steam Fitting Company.

VI.

In holding as conclusions of fact (*a*) that the plaintiff did not give such notice by their publication of the commencement of the action, as is required by the Act of Congress of Aug. 13, 1894, as amended by Act of Feb. 24, 1905; (*b*) that the last publication of notice to creditors of the commencement of the action was not made at least three months before the time limited for creditors to intervene in this action; (*c*) that the time limited for creditors to intervene in this action expired on the 19th day of February, 1909, and that the last publication of notice to creditors was not made by the use-plaintiff three months prior thereto, to wit, on or before November 19, 1908, but such notices continued to be published thereafter until and including November 25th, 1908; that such notice was not published for three weeks prior to said November 19th, 1908.

VII.

In holding as conclusions of law (*a*) that by reason of the alleged failure of the use-plaintiff to give notice within the time limited therefor by the Act of Congress it could not maintain this action against the defendants upon the bond; (*b*) that not having given the notice by publication in manner as required by said Act the said use-plaintiff should not be permitted to give evidence as to the amount of labor and materials alleged to have been performed by it

188 under said contract; (*c*) that the use-plaintiff not having brought this action in accordance with the requirements of said Act, the complaint should be dismissed; (*d*) that the stipulation entered into between the attorneys of the parties herein, in so far as it purports to relieve the use-plaintiff of its obligations to

comply with the terms of the Act is ineffectual and void, and (c) that judgment should be entered in favor of the defendants as against the plaintiff, dismissing the complaint with costs and disbursements.

Wherefore the said plaintiff prays that the judgment of said United States District Court for the Southern District of New York, be reversed, and that the said District Court be directed to grant a new trial of said cause.

New York, Oct. 14th, 1912.

GEORGE B. CLASS,
Attorney for Plaintiff.

156 Fifth Avenue, Borough of Manhattan, New York City, N. Y.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Oct. 19, 1912.

189

Bond on Writ of Error.

American Surety Company of New York.

Capital and Surplus Over $6,000,000.

Company's Office Building, 100 Broadway, New York.

Home Office Agency, No. 45175.

United States District Court for the Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff-in-Error,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & SURETY COMPANY, Defendants-in-Error.

Know all men by these presents, That we, American Surety Company of New York, a corporation, are held and firmly bound unto the New York Steam Fitting Company and The Title Guaranty & Surety Company, in the sum of two hundred and fifty dollars ($250.00), to be paid to the said New York Steam Fitting Company and The Title Guaranty & Surety Company, their successors or assigns; to which payment well and truly to be made, we bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seal and dated the 16th day of October, 1912.

Whereas, lately at a session of the District Court of the United States, for the Southern District of New York, in a suit pending in said Court, between the United States of America for the use and benefit of Alexander Bryant Company, plaintiff, and New York Steam Fitting Company and The Title Guaranty & Surety Company, defendants, a judgment was rendered against the said plaintiff, and the said Alexander Bryant Company having obtained a writ of

error to the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and the amount of the Bond thereon having been fixed at Two Hundred and Fifty Dollars.

Now, the condition of this obligation is such, That if the said Alexander Bryant Company shall prosecute the said writ of error to effect and shall answer all damages and costs that may be awarded against it in case it shall fail to make its plea good, then this obligation to be void, otherwise to remain in full force and virtue.

[L. S.] AMERICAN SURETY COMPANY
OF NEW YORK,
By HORACE P. HOLLISTER,
Resident Vice-President.

Attest:
M. W. DIVINE,
Resident Assistant Secretary.

190 STATE OF NEW YORK,
County of New York, ss:

On this 16th day of October, 1912, before me personally appeared Horace P. Hollister, Resident Vice President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say: that he resides in Mt. Vernon, N. Y.; that he is the Resident Vice President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation; and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Horace P. Hollister further said that he is acquainted with M. W. Divine and knows him to be one of the Resident Assistant Secretaries of said Corporation; that the signature of said M. W. Divine subscribed to the said instrument is in the genuine handwriting of the said M. W. Divine and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said Horace P. Hollister Resident Vice President.

[L. S.] E. A. FARRELL,
Notary Public, New York County No. 7,
Register's Officer New York County No. 3002.

Certificate filed in all Counties.

191 *Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.*

The first quarterly meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Wednesday, January 17, 1912, at 12 o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Tuesday, December 12, 1911, for the purpose of nominating officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for

* * * * * * *

PLACE.	RESIDENT VICE PRESIDENTS.	RESIDENT ASSISTANT SECRETARIES.
New York, N. Y.	Richard Deming Horace P. Hollister Marshall L. Brower A. E. Cotterell	A. L. Adams Marshall L. Brower William H. Bishop Horace P. Hollister Jared F. Harrison A. E. Cotterell M. W. Divine

* * * * * * *

"Whereupon, it was Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present for the officers, members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

* * * * * *

"The following resolution was adopted:

"Resolved, that the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK,
County of New York, ss:

I, H. A. Reiss, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct ex-

tracts and transcripts therefrom as they appear of record and ar
set forth and contained in said Record Book; and I further certif
that I have compared the foregoing resolutions with the original
thereof, as recorded in the Minute Book of said Company, and d
certify that the same is a correct and true transcript therefrom, an
of the whole of said original resolutions; and that the said resolu
tions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City o
New York, this 21st day of August, 1912.

[Seal American Surety Company of New York.]

H. A. REISS,
Assistant Secretary.

192 (Endorsed:) Approved N. Y., Oct. 17, 1912. L. H., D. J.
U. S. District Court, S. D. of N. Y., Filed Oct. 19, 1912.

193 By the Honorable Learned Hand, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to New York Steam Fitting Company, John J. Donovan, Esq., attorney, 30 Church St., N. Y. City, N. Y.; The Title Guaranty & Surety Company, Adrian T. Kiernan, Esq., attorney, 141 Broadway, New York City, New York, Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court to be holden at Washington, in the District of Columbia, on the 15th day of November, 1912, pursuant to a Writ of Error, filed in the Clerk's Office of the United States District Court for the Southern District of New York, wherein United States of America for the use and benefit of Alexander Bryant Company is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 17th day of October, in the year of our Lord One Thousand Nine Hundred twelve, and of the Independence of the United States the One Hundred and Thirty seventh.

LEARNED HAND,
Judge of the United States District Court for the Southern District of New York.

194 [Endorsed:] Law 3-76 (1912). United States District Court, Southern District of New York. United States of America for the use and benefit of Alexander Bryant Company, Plaintiff in Error, vs. New York Steam Fitting Company and The Title Guaranty & Surety Company, Defendants in Error. 10. Citation. George B. Class, Attorney for Plaintiff in Error, 156 Fifth Avenue, Boro' of Manhattan, N. Y. City, N. Y. U. S. District Court, S. D. of N. Y. Oct. 19, 1912, M. Law 3/76.

195 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY, Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & SURETY COMPANY, Defendants.

STATE OF NEW YORK,
County of New York, ss:

George B. Class being duly sworn deposes and says: that he is over the age of twenty-one years, and resides in the City of New York, New York; that on the 17th day of October, he personally served a copy of the Citation, Writ of Error, petition and Order Allowing Writ of Error, and Assignment of Errors, in the above-entitled action, upon Adrian T. Kiernan, Esq., attorney for The Title Guaranty & Surety Company, one of the defendants in the above-entitled action, at his office at 141 Broadway, Borough of Manhattan, New York City, New York, by leaving with said Adrian T. Kiernan, personally, a copy of each of the above-named papers.

GEO. B. CLASS.

Sworn to before me this 18th day of October, 1912.
[SEAL.]
I. D. MORRISON,
Notary Public No. 122, New York Co.

(Endorsed:) U. S. District Court, S. D. of N. Y., Filed Oct. 19, 1912.

196 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRANT COMPANY, Plaintiff,
against
NEW YORK STEAM FITTING COMPANY and THE TITLE GUARANTY & SURETY COMPANY, Defendants.

STATE OF NEW YORK,
County of New York, ss:

Milton Hart being duly sworn deposes and says: That he is over the age of twenty-one years, and resides in the City of New York, New York; that on the eighteenth day of October, 1912, he personally served a copy of the Citation, Writ of Error, Petition and Order allowing Writ of Error, and Assignment of Errors, upon John J. Donovan, Esq., attorney for the New York Steam Fitting Company, one of the defendants in the above entitled action, at 30 Church Street, Borough of Manhattan, New York City, New York, by leaving a copy of each of the above named papers in the above-entitled action, with

the clerk in charge of the office of said John J. Donovan, Esq., at 30 Church Street, Borough of Manhattan, New York City, New York.

MILTON HART.

Sworn to before me this 18th day of October, 1912.
[SEAL.]
I. D. MORRISON,
Notary Public No. 22, New York Co

(Endorsed:) U. S. District Court, S. D. of N. Y., Filed Oct. 1912.

[Endorsed:] United States Supreme Court. United States America, for the use and benefit of Alexander Bryant Compa Pl'ff in Error, against New York Steam Fitting Company and Title Guaranty & Surety Company, Def't- in Error. Transcrip Record.

Endorsed on cover: File No. 23,424. S. New York, D. C. U. S. Term No. 379. United States of America for the use and benefit of Alexander Bryant Company, plaintiff in error, vs. New York Steam Fitting Company and The Title Guaranty & Surety Company. Filed November 18th, 1912. File No. 23,424.

FILED
MAR 17 1914
JAMES D. MAHER
CLERK

Supreme Court of the United States,

[No. [redacted]. October Term, 1913.]

87

UNITED STATES OF AMERICA for the Use and Benefit of ALEXANDER BRYANT COMPANY,

Plaintiff-in-Error,

against

NEW YORK STEAM FITTING COMPANY and the TITLE GUARANTY & SURETY COMPANY,

Defendants-in-Error.

MOTION TO DISMISS WRIT OF ERROR AND NOTICE THEREOF.

Adrian T. Kiernan,
Attorney for Title Guaranty & Surety Company,
Defendant-in-Error,
141 Broadway,
Manhattan,
New York City, N. Y.

New York:
Stillman Appellate Printing Co.
1914.

Supreme Court of the United States,

No. 379, October Term, 1913.

United States of America for the use and benefit of Alexander Bryant Company, Plaintiff-in-Error, against New York Steam Fitting Company and the Title Guaranty & Surety Company, Defendants-in-Error.	Motion to Dismiss Writ of Error.

And now comes the Title Guaranty & Surety Company, defendant-in-error, by Adrian T. Kiernan, Esq., its counsel, and moves to dismiss, with costs, the writ of error heretofore issued herein on October 17, 1912, to the District Court of the United States for the Southern District of New York, on the ground that said writ was allowed upon a certificate that the jurisdiction of the Court below is in issue and that the record shows that no question as to the jurisdiction of the Court below to hear and determine the cause is in issue.

SUPREME COURT OF THE UNITED STATES,

No. 379, October Term, 1913.

United States of America for the use and benefit of Alexander Bryant Company, Plaintiff-in-Error, against New York Steam Fitting Company and the Title Guaranty & Surety Company, Defendants-in-Error.	Notice of Motion to Dismiss Writ of Error.

Please take notice that upon the Transcript of Record filed in this Court on November 18, 1912 (23,424), and now printed, and upon the printed brief, a copy of which is herewith served upon you, the defendant-in-error, the Title Guaranty & Surety Company will make and submit to this Court at a Stated Term thereof, to be held in the Capitol, in the City of Washington, D. C., on the 13th day of April, 1914, at the opening of the Court on that day, and if motions are not then heard, then at the next succeeding motion day of this Court, a motion, a copy of which is hereto annexed, and will then move that the writ of error heretofore issued herein to the District Court of the United States for the Southern District of New York on October 17, 1912, be dismissed on the ground that said writ was allowed upon a certificate that the juris-

diction of the Court below is in issue and that no question as to the jurisdiction of the Court below to hear and determine the cause is in issue.

Dated, March 12, 1914.

Yours, &c.,

ADRIAN T. KIERNAN,
Attorney for Title Guaranty & Surety Company,
Defendant-in-Error,
141 Broadway, Manhattan,
New York City.

To GEORGE B. CLASS, Esq.,
Attorney for Alexander Bryant Company,
Plaintiff-in-Error.

Stillman Appellate Printing Co., 31 Broad St., N. Y.

SUPREME COURT, U. S.
FILED
MAR 17 1914
JAMES D. MAHER
CLERK

Supreme Court of the United States,

No. [redacted] October Term, 1913.

87

United States of America for the use and benefit of Alexander Bryant Company,
Plaintiff-in-Error,

against

New York Steam Fitting Company and the Title Guaranty & Surety Company,
Defendants-in-Error.

Brief in Support of Motion to Dismiss.

In error to the District Court of the United States for the Southern District of New York.

This is a motion to dismiss the writ of error on the ground that the jurisdiction of the District Court was not in issue in the sense of Section 238 of the Judicial Code of March 3, 1911, c. 231.

The transcript of the record has been printed and the case is on the General Calendar, numbered 379. This motion is based upon the printed record.

As "this Court takes notice of its own jurisdiction and whether the question is raised by the counsel or not, inquires of its own motion whether there is jurisdiction to entertain any given case before it" (Fore River Shipbuilding Co. vs. Hagg, 219

U. S., 175, at p. 177), the propriety of making this motion at this time is not in question.

This action was brought against the principal and surety on a bond given conformably to the Act of August 13, 1894, c. 280, 28 Stat. 278, as amended February 24, 1905, c. 778, 33 Stat. 811, for the performance of a contract for the construction of a public building and containing the required additional condition relating to the payment of claims for labor and materials. The plaintiff is a subcontractor who claimed that it had not been paid by the contractor for labor and materials furnished. The surety answered, setting up no plea to the jurisdiction of the Court, but raising an issue as to whether the provisions of the Act had been complied with so as to enable the plaintiff to recover (Record, pp. 21-3). The trial of the action was referred and resulted in a non-suit at the end of the plaintiff's case for failure of proof (p. 63). This ruling was proper as no evidence had been admitted that the plaintiff had furnished any labor or materials. The plaintiff had, however, tendered such proof and it was excluded as immaterial on the ground that the evidence showed that the plaintiff had not complied with the requirement of the statute (quoted at page 59 of the Record) that notice to creditors should be published at least three months before the expiration of the year after acceptance of the public work (pp. 62-3).

Upon this record the plaintiff obtained a certificate that a question of jurisdiction is involved (p. 92) and took out a writ of error from this Court instead of appealing to the Circuit Court of Appeals.

There was no controversy in this case as to whether the District Court had power to hear and determine the cause. It was not disputed that the

action was properly brought in the right court and district and jurisdiction of the subject of the action expressly conferred on this particular Court by the statute and jurisdiction of the parties duly acquired.

The defendants were brought in as parties by the service of a summons (p. 3) and the notice that the plaintiff failed to properly publish had no relation to acquiring jurisdiction over them.

The subject of the action was the alleged liability of the defendants to the plaintiff upon the bond in suit.

While the counsel, Referee and Judge below might refer to this as a jurisdictional matter, whether it is such will be determined by this Court on the facts and not through the characterization or certificate of counsel or Court.

The ruling of the Referee that compliance with the statutory requirements as to giving notice to other creditors was an essential element of the plaintiff's cause of action did not involve any question of jurisdiction. It was just such a question as to the right to recovery as general courts have to pass on in any form of action as, for instance, in an action for foreclosure of a mechanics' lien, whether the notice of lien complies with the statute or necessary notices have been given or orders made to create or preserve the lien or whether a Statute of Limitations bars the right of recovery. Such decisions may turn a plaintiff out of Court, but the denial of a right to grant relief upon the facts is not a denial of jurisdiction to entertain the action.

Whether the Referee was right in holding, in accordance with the decisions of the lower courts (U. S. vs. Stannard, 206 Fed. Rep., 326; Baker Contracting Co. vs. U. S., 204 Fed. Rep., 390) that

the failure to give notice to the other creditors is a limitation upon the liability, is not presented by this motion. If he was wrong, it was a ruling upon an incidental question of substance, not of jurisdiction, which should have been reviewed by the Circuit Court of Appeals.

When this action was commenced the attorneys for the contractor took over the defense for the surety and appeared for it (p. 78). They made a stipulation as follows:

> "The defendants waive any failure on the part of the plaintiff to notify creditors under the third proviso of the Statute, provided no more such notices are sent" (p. 78).

The Referee held that this stipulation was uneffective and void in so far as it purports to relieve the plaintiff of its obligations to comply with the statute (p. 79).

Whether the Referee was right in so holding is not presented by this motion and is not argued. The stipulation was pertinent only to the question of whether the plaintiff had established a right to recover upon the bond in suit, the same question that it is argued above, did not involve a question of the jurisdiction of the Court. If the Referee was wrong, his ruling should have been reviewed by the Circuit Court of Appeals.

The writ of error should be dismissed as no question as to the jurisdiction of the Court below to hear and determine the action is presented by the record.

Respectfully submitted,

ADRIAN T. KIERNAN,
Attorney for Defendant-in-Error,
Title Guaranty & Surety Company.

Office Supreme Court, U. S.
FILED
APR 9 1914
JAMES D. MAHER

Supreme Court of the United States.

No. 87 October Term, 1913.

UNITED STATES OF AMERICA, for the use and benefit of ALEXANDER BRYANT COMPANY,
Plaintiff-in-Error,

against

NEW YORK STEAM FITTING COMPANY and the TITLE GUARANTY & SURETY COMPANY,
Defendants-in-Error.

BRIEF IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

In error to the District Court of the United States for the Southern District of New York.

The Title Guaranty & Surety Company, one of the defendants-in-error, moves to dismiss the writ of error herein upon "the ground that said writ was allowed upon a certificate that the jurisdiction of the Court below is in issue, and that no question as to the jurisdiction of the Court below to hear and determine the cause, is in issue." The motion is based upon the printed record, transcript of which has been printed, and the case is on the General Calendar, numbered 379.

This action was brought by a subcontractor

against the defendants as principal and surety on a bond given pursuant of the Act of August 13th, 1894, Chapter 280, 28 Stat., 278, as amended February 24, 1905, C. 778, 33 Stat., 811 entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works." The plaintiff-in-error seeks to recover an unpaid balance of upwards of $5,600 as the value of labor and material furnished in the construction of the Custom House at New York City, N. Y. The Federal statute (*supra*) under which this action was brought expressly provides that such an action *must* be brought in the (then) Circuit Court, "and not elsewhere," conditioned upon certain prerequisite provisos. One of these attempts to describe the manner in which service shall be made upon other creditors who may be interested under the bond. The statute upon this point is ambiguous.

At the trial, the plaintiff introduced evidence calculated to show that this statutory prerequisite had been met. This was disputed by the defendant, Surety Company. In the discussion, their attorney, *Mr. Kiernan, insisted that "the publication of the notice to creditors and service of notice upon the creditors is a jurisdictional matter"* (*vide*, fol. 82, p. 42 of Printed Record). Mr. Kiernan now claims just the opposite, and moves for dismissal of the writ of error, on the ground "that the record shows that no question as to the jurisdiction of the Court below to hear and determine the cause is in issue" (Notice of Motion).

In the trial before the Referee, the plaintiff offered to introduce evidence as to labor and material furnished, but on motion of the Surety Company's attorney (Mr. Kiernan), the Referee

ruled that as "the plaintiff has not complied with one of the conditions of the statute, that evidence of the labor performed and materials furnished would be incompetent, irrelevant and immaterial," and on motion to dismiss the complaint the motion was granted on the ground that the plaintiff had not proved the right to maintain the action under the Act of 1905 (fol. 128).

That the dismissal was for want of jurisdiction over the persons and subject matter is plainly set forth in the printed Record, as follows:

The Referee, referring to service on parties interested, says:

> "*Whoever duty it was, if summoning all interested parties is jurisdictional, the Court can take no action until it has been done by some one in the manner prescribed* (fol. 124).

And, again, referring to the stipulation made by the defendant Surety Company to "waive any failure to notify creditors under the third proviso of the statute provided no more such notices are sent," the Referee says:

> "*The offering of this stipulation, therefore, does not excuse the plaintiff from producing jurisdictional proof, in accordance with the terms of the statute*" (fol. 125).

The opinion of Mr. Justice Hand in his certificate concludes "*that the jurisdiction of the Court over the persons and subject matter in this action is in issue* and accordingly certifies to this Court the question "whether under these circumstances the defendant surety company's motion to dismiss the complaint for want of jurisdiction should have been granted."

From the foregoing it is apparent that in this

action the Court, the Referee and both counsel considered that the case was dismissed for want of jurisdiction.

In the case of Noble *v.* Union River Logging R. Co. (147 U. S., 165-173) this Court emphasizes the distinction between facts "which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the Court is a mere nullity (such, for example as the service of process within the State upon the defendant in a common law action * * * a publication in strict accordance with the statute where the property of an absent defendant is sought to be charged, etc.), and that other "class of facts which are termed quasi-jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion but which when properly alleged and established to the satisfaction of the Court cannot be attacked collaterally. With respect to these facts the finding of the Court is as conclusively presumed to be correct, as its finding with respect to any other matter in issue between the parties, as, for example, the allegation and proof of divers citizenship, the fact that one of an estate has reached his majority when the act provided that the estate shall not be sold if all the heirs were minors and others of a kindred nature *where the want of jurisdiction does not go to the subject matter or the parties* but to a preliminary fact necessary to be proven to authorize the Court to act" (cited from Noble *v.* Union River Logging R. Co., 147 U. S., 165-173).

In the case at bar the Referee decided that he could not proceed for want of jurisdiction arising of the alleged failure of the plaintiff to make

service upon interested parties, pursuant of the requirements of the statute.

This brings the case within the provisions of Section 238 of the Judicial Code (36 Stat., 1157), which provides that, "Appeals and writs of error may be taken from the District Courts * * * in any case in which the jurisdiction of the Court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the Court below, for decision."

Where jurisdiction is conferred by a statute (as in the case at bar) which contain specific requirements as to notice to parties in interest, such proof is jurisdictional and must be affirmatively shown before the Court can adjudicate the controversy. This, I understand, to be the rule. The Referee, whether right or wrong, decided that the Court was without jurisdiction to proceed. Upon that decision the plaintiffs have appealed directly to the Court under the provisions of the Judicial Code.

The motion to dismiss the writ of error herein should be denied.

Respectfully submitted,

GEORGE B. CLASS,

Attorney for the Plaintiff-in-Error,

156 Fifth Avenue,

Manhattan Borough,

New York City, N. Y.

Office Supreme Court, U. S.
FILED
OCT 10 1914
JAMES D. MAHER
CLERK

No. 67

SUPREME COURT OF THE UNITED STATES.

October Term, 1913.

[redacted]

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF ALEXANDER BRYANT COMPANY,

Plaintiff-in-Error,

against

NEW YORK STEAM FITTING COMPANY AND THE TITLE GUARANTEE AND SURETY COMPANY,

Defendants-in-Error.

BRIEF OF PLAINTIFF-IN-ERROR.

On their Appeal upon Certification of Question of Jurisdiction from the District Court of the United States for the Southern District of New York, Second Circuit.

GEORGE B. CLASS,
Attorney for Plaintiff-in-Error,
156 Fifth Avenue,
Borough of Manhattan,
New York City, N. Y.

APPEAL PRINTING COMPANY, New York.

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When one section of a statute treats specifically and solely of a matter, that section prevails in reference to that matter (Long *v.* Culp, 14 Kan., 412) 17

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When the first section of a statute conforms to the obvious legislative intent, it is not rendered inoperative by any later section which may appear inconsistent with that intent (State *v.* Bates, 96 Minn., 110; Hall *v.* State, 39 Fla., 637).. 18

A later clause which is obscure and incoherent will not prevail over an earlier one which is clear and explicit (Gudlich on Interpretation of Statutes, Section 183) 18

That the third proviso is directory and not mandatory or jurisdictional (Sutherland on Statutory Construction, Vol. 1, pp. 1114-1115-1116 and 1138 19-20

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subcontractors, etc., may be asserted in a suit on the bond, but that the decision is directory only, and where claims were asserted within the six months specified it was immaterial that the notice was not published three months and three weeks prior to the expiration of the year within which suit might be instituted. Citations relating to most of the aspects of the case at bar are found on pages .....23 to 29

POINT TWO: The failure to obtain a Court order as to service by publication, under the Act, is not fatal to plaintiff's recovery, in view of the ambiguity of the statute upon the subject, and where the notice to all creditors of their right to intervene was published daily for three consecutive weeks in manner and form as done by plaintiff, and where the record fails of showing that any creditor was injured by any alleged defect as to time and manner of notice 30

Ambiguity of the act discussed and a concrete case showing the absurd and contradictory results following defendants' and the Referee's construction of the Act...34-35

POINT THREE: The stipulation (p. 65) equitably estops the defendants from raising any objection as to the sufficiency of the notice required by Proviso Three of the Act. The time and circumstances under which the stipulation was made show that no injury or fraud was wrought against cred-

itors by the making of the stipulation. Defendants should not be permitted to assert provisions of the Act intended for the benefit of creditors, in order to extinguish their own liability to such creditors upon the bond given for their benefit 37

The doctrine discussed in its application to a situation of the character of that in the case at bar, Van Rensselaer *v.* Kearney, 11 Howard, 326 40

That the defendants are estopped from pleading insufficiency of notice under the circumstances, etc. Encyclopedia of United States Supreme Court Reports, Vol. 5, page 590; Catts *v.* Whalen, 2 Howard, 376; U. S. *v.* Girault, 11 Howard, and other cases cited in brief 39-40

The principle of equitable estoppel is, that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he will not in a court of justice be permitted to avail himself of that advantage. Encyclopedia of United States Supreme Court Reports, Vol. 5, page 938; Insurance Co. *v.* Wilkinson, 13 Wallace, 222; Dair *v.* U. S., 16 Wallace 41

The Case of Dickerson *v.* Colegrove, 100 U. S., 78, as illustrating the great lengths to which this Court has applied the doctrine 41-42

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CONCLUSION: Plaintiff respectfully submits that the jurisdictional question certified to this Court as to "whether under these circumstances the defendant Surety Company's motion to dismiss the complaint for want of jurisdiction should have been granted" should be answered in the negative and that the cause should be remanded to the District Court for a new trial consistent with the decision of this Court 43

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 379.

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF ALEXANDER BRYANT COMPANY, PLAINTIFF-IN-ERROR,

v.

NEW YORK STEAM FITTING COMPANY AND THE TITLE GUARANTEE AND SURETY COMPANY, DEFENDANTS-IN-ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S BRIEF.

Statement.

The writ of error in this case brings before this Court the certificate of Hon. Learned Hand, of the District Court for the Southern District of New York, as to the jurisdiction of the said Court pursuant of the provisions of §238 of the Judicial Code, being the Judiciary Act of Congress of the United States, approved March 3, 1911 (*vide* Certificate as to Jurisdiction, *infra*).

The facts in this case, stated briefly in their chronological order, are as follows:

1. The defendant, New York Steam Fitting Company, a New Jersey corporation, entered into a contract with the United States of America on the 12th day of July, 1905, whereby the said corporation undertook to furnish the material and labor for the installation of the mechanical equipment for the new Custom House in New York, N. Y., including boiler plant, steam piping and direct radiation, heating and ventilation, plumbing, etc. The contract was modified by changes subsequently made by the Government, but which did not affect the general character of the contract and was in all respects fully completed in compliance with the requirements of the original contract, as modified, and was accepted, and final settlement was made therefor February 19th, 1908, by payment by the United States of America to the New York Steam Fitting Co. (p. 72).

2. Said New York Steam Fitting Company gave a penal bond (p. 14) in the sum of $115,000 in the usual form required by the Act of Congress, Feb. 24th, 1905, Chap. 778, 32 Stat. at Large, 811, in which bond the defendant The Title Guaranty and Surety Company (then conducting business under the corporate name "The Title Guaranty & Trust Company of Scranton, Penna., p. 45) was joined as surety.

3. Thereafter on or about Nov. 2, 1908, an action was commenced in the (then) United States Circuit Court for the Southern District of New York against the defendants as principal and sureties on said bond. The action was brought in the name

of the United States of America for the use and benefit of the plaintiff (as in aforesaid statute provided) to recover the sum of $5,620.50 and interest for material and labor furnished by the plaintiff in connection with the construction of the United States Custom House, at New York City, New York, pursuant of their contract with the defendant New York Steam Fitting Company.

4. The action having come on for trial in the (then) U. S. Circuit Court, and having been discontinued as to two intervening creditors (p. 45), upon the consent of the parties, including a third intervening creditor, an order was entered referring the issues to Henry Melville, Esq., to hear and determine, the order providing that judgment might be entered in conformity with his decision as if said cause had been heard before the Court. Before trial the third intervening creditor had settled with defendants. At the trial before the Referee the plaintiff, against the objections of the defendant Surety Company, introduced testimony as to the publication of a notice to creditors (Plaintiff's Exhibit 2, p. 64) in the "New York Press," beginning Nov. 5th, 1908, and continuing daily for twenty-one consecutive days to and including Nov. 25th, 1908. It was admitted that no court order was obtained for said publication.

The notice was as follows (p. 64):

> "Circuit Court of the United States, Southern District of New York. United States of America for the Use and Benefit of Alexander Bryant Company, Plaintiff, *against* New York Steam Fitting Company and The Title Guaranty & Trust Company of Scranton, Penna., Defendants.
>
> "Please take notice that the above-named

Alexander Bryant Company, has commenced an action in the name of the United States of America under the provisions of the Act of Congress of August 13th, 1894 (as amended by Act of Congress of Feb. 24th, 1905), to recover a judgment against the defendant, New York Steam Fitting Company, and its surety, The Title Guaranty & Trust Company of Scranton, Penna., for a sum of money alleged to be due and owing to the aforesaid Alexander Bryant Company for work, labor, materials and service furnished as sub-contractors under the contract and bond entered into by the New York Steam Fitting Company for the mechanical equipment of the new Custom House at New York City, New York, in which bond the defendant, The Title Guaranty & Trust Company of Scranton, Penna., is joined as surety.

"As required by the express provisions of the aforementioned acts of Congress, and as one of the creditors of the New York Steam Fitting Company, under aforesaid contract, you are hereby notified of your right to intervene and be made an additional party plaintiff in this action as the Court may order, so as to have the rights and claims of any and all existing creditors under said contract and bond, adjudicated in one and the same action.

"Dated, New York, Nov. 2nd, 1908.

"GEORGE B. CLASS,
"Attorney for Plaintiff,
"156 Fifth Avenue,
"Borough of Manhattan,
"N. Y. City, N. Y."

Thereafter it was established that February 19th, 1908, was the date of "final settlement" between the United States and the defendant New York Steam Fitting Company.

The use-plaintiff, against the objection of the

defendant Surety Company, offered in evidence a stipulation entered into between the use-plaintiff and the (then) attorneys for both the defendants as follows (p. 65):

> "Circuit Court of the United States, Second Circuit in the Southern District of New York.
>
> "United States of America for the Use and Benefit of Alexander Bryant Company, Plaintiff, *against* New York Steam Fitting Company and Another, Defendants.
>
> "It is hereby consented that the defendants' time to move or plead herein be and the same hereby is extended to and including December 16th, 1908, and
>
> "It is hereby consented on the part of defendants, that defendants waive any failure on the part of the plaintiff to notify creditors under the third proviso of the Statute, provided no more such notices are sent.
>
> "Dated, New York, November 21, 1908.
>
> "GEO. B. CLASS,
> "Attorney for Plaintiff.
>
> "HARDY & SHELLABARGER,
> "Attorneys for Defendants."

The testimony shows that this stipulation was entered into by the parties at a time when the plaintiff had already served personal notice on all known creditors (pp. 38-36) and while the notice to creditors was running in the "New York Press." The publication of notice to creditors as to their right to intervene (p. 64) was, however, uninterrupted and was continued daily to and including November 25th, 1908, which was the twenty-first consecutive day of publication, as required by the Statute.

Upon the trial before the Referee he held that

the "offering of this stipulation does not excuse the plaintiff from producing *jurisdictional* proof in accordance with the terms of the Statute" (top of p. 62) * * * "Whosever duty it was, if summoning all interested parties is *jurisdictional, the Court can take no action* until it has been done by some one in the manner prescribed (p. 61). He further held (p. 62): "I rule, in view of the fact that I have held that the plaintiff has not complied with one of the conditions of the statute that evidence of the labor performed and materials furnished would be incompetent, irrelevant and immaterial."

The use-plaintiff was accordingly not permitted to make his case.

The defendant Surety Company then moved to dismiss the complaint and the motion was granted on the ground that the right to maintain this action under the Act of 1905 had not been proved (p. 63).

To all of the foregoing the use-plaintiff duly excepted.

Three creditors filed their respective intervening petitions by leave of Court, but the claims of each were settled prior to the trial before the Referee.

At the trial the defendant Surety Company contended that "the publication of notice to creditors and service of notice upon creditors is a jurisdictional matter" (p. 42), while in their motion here to dismiss they now contend for just the opposite, asserting "that the record shows that no question as to the jurisdiction of the Court below to hear and determine the cause is in issue." At the trial, the Referee agreed with the defendant's former proposition and held that the matter of service of notice on interested parties was jurisdictional, and

that the Court could take no action until that had been done in the manner prescribed by the Statute. His language was as follows: "Whosever duty it was, if summoning all interested parties is *jurisdictional*, the Court can take no action until it has been done by some one in the manner prescribed" (p. 61).

The use-plaintiff contends that the only limitations incorporated in the *right to sue* as conferred by the act, upon those furnishing labor and material to the contractor, are (1) that such suit "shall be commenced within one year after performance and final settlement of said contract and not later," and (2) the provision that only one action can be brought, in which any other creditor may intervene by filing his claim and being thereby made a party thereto "within one year from the completion of the work under said contract and not later"; that these are the only limitations upon the right of action as conferred by the Statute, and are jurisdictional and are obviously intended for the benefit of the sureties as distinguished from the last proviso of the Statute which requires notice to known creditors, and publication of notice for three weeks to unknown creditors, which provisions are as obviously intended for the benefit of the creditors alone—the special class in whose favor the Statute was enacted.

The defendant Surety Company contended before the Referee, and the latter held, that these third proviso requirements are jurisdictional and require that the last of the three weeks' notice would have to be published three months prior to the end of the year, within the last six months of which the materialman's action must be brought. This construction would operate to limit the time in

which such action could be brought, to only two months and one week next following the first six months after completion of final settlement in which only the United States could sue.

The plaintiff on the contrary contends that this third proviso is not mandatory or jurisdictional, but only directory: that the construction given to the Statute by the Referee defeats the general purposes of the act in respect of the class for whom the right of action was created, and destroys the substantive right conferred upon that class in the body of the act, which unequivocally provides "that where suit is instituted by any such creditor on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be *commenced within one year after the performance and final settlement* of said contract and not later.

The question involved therefore is, the construction of the Act of Congress of February 24, 1905, 33 Stat., 811, which provides, first, that a suit may be instituted by any creditor within one year, and not later; and later provides that notice to creditors by advertisement shall be given for at least three weeks; the last publication to be at least three months before the time limited "therefor." Does the latter provision repeal or modify the provision permitting suit within one year, and prevent a recovery in an action brought within the year, but too late for publication? In the case at bar the "final settlement" with the Government was February 19, 1909. The last of the three weeks of advertising ended November 25, 1909, or six days beyond the three months prior to the year ending February 19, 1909.

Certificate as to Jurisdiction.

"The question whether, in an action, brought under the Act of Congress of February 4th, 1905 (33 Stat. at Large, 811, Chap. 778), entitled '*An act for the protection of persons furnishing materials and labor for the construction of public works,*' by a subcontractor against the contractor and his surety to recover on the bond of the said contractor and surety, given to secure payment for the material and labor furnished in the construction of public works, the Court has jurisdiction to proceed with the trial of said action between said parties, under the following circumstances, considered with reference to the provisions of said Act of Congress of Feb. 4th, 1905:

"(a) Where the date of completion and final settlement with the United States was February 19th, 1908; (b) where the publication of a notice (in form as in Plaintiff's "Exhibit 2") notifying all creditors of their right to intervene, was commenced in the New York Press Nov. 5th, 1908, and was continued daily for twenty-one days to and including November 25th, 1908; (c) where no order of the Court was obtained with reference to said notice of publication; (d) where after all known creditors had been personally served by plaintiff with notice of their right to intervene in the action instituted by the plaintiff, the defendants by their then attorneys, stipulated and consented as follows: 'It is hereby consented on the part of defendants, that the defendants waive any failure on the part of the plaintiff to notify creditors under the third proviso of the statute, provided no more such notices are sent,' and whether under these circumstances the defendant surety company's motion to dismiss the complaint for want of jurisdiction should have been granted" (p. 90).

ASSIGNMENTS OF ERROR.

I.

In striking out the testimony of Mr. de Lisser, advertising auditor of the New York Press, given in proof of the publication therein of notice to creditors, required to be given by the provisions of the Act of Congress of August 13th, 1894, as amended by Act of Congress of February 24th, 1905, under which this action was brought (p. 62 of Record).

II.

In striking out, on defendant's motion, the following stipulation after having received the same when offered in evidence by the plaintiff (pp. 45 and 62 of Record):

"United States Circuit Court, Southern District of New York.

"United States of America for the Use and Benefit of Alexander Bryant Company, Plaintiff,

"*against*

"New York Steam Fitting Company and The Title Guaranty & Surety Company of Scranton, Pennsylvania, Defendants.

"It is hereby consented on the part of the defendants that the defendants waive any failure on the part of the plaintiff to notify creditors under the third proviso of the statute provided no more such notices are sent.

"Dated, New York, Nov. 21, 1908.

"GEORGE B. CLASS,
"Attorney for Plaintiff.

"HARDY & SHELLABARGER,
"Attorneys for Defendants."

III.

In refusing to receive plaintiff's evidence of labor performed and material furnished, upon the following ruling: "I rule in view of the fact that I have held that the plaintiff has not complied with one of the conditions of the statute, that evidence of the labor performed and materials furnished would be incompetent, irrelevant and immaterial" (p. 63 of Record).

IV.

In granting defendants' motion to dismiss the complaint on the ground that "no cause of action or the right to maintain this action under the Act of 1905 has been proved by the plaintiff" (p. 63 of Record).

V.

In the refusal of the Referee to admit as evidence certain correspondence which passed between plaintiff's attorney and the defendant surety company, which was offered to show that the plaintiff was prompt in notifying the defendant surety company of the defaults in payment of moneys due and owing to the plaintiff by the defendant New York Steam Fitting Company (p. 57 of Record).

VI.

In holding as conclusions of fact (a) that the plaintiff did not give such notice by their publication of the commencement of the action, as is required by the Act of Congress of Aug. 13, 1894, as amended by Act of Feb. 24, 1905; (b) that the

last publication of notice to creditors of the commencement of the action was not made at least three months before the time limited for creditors to intervene in this action; (c) that the time limited for creditors to intervene in this action expired on the 19th day of February, 1909, and that the last publication of notice to creditors was not made by the use-plaintiff three months prior thereto, to wit, on or before November 19, 1908, but such notices continued to be published thereafter until and including November 25th, 1908; that such notice was not published for three weeks prior to said November 19th, 1908 (pp. 77 and 78 of Record).

VII.

In holding as conclusions of law (a) that by reason of the alleged failure of the use-plaintiff to give notice within the time limited therefor by the Act of Congress it could not maintain this action against the defendants upon the bond; (b) that not having given the notice by publication in manner as required by said Act the said use-plaintiff should not be permitted to give evidence as to the amount of labor and materials alleged to have been performed by it under said contract; (c) that the use-plaintiff not having brought this action in accordance with the requirements of said Act, the complaint should be dismissed; (d) that the stipulation entered into between the attorneys of the parties herein, in so far as it purports to relieve the use-plaintiff of its obligations to comply with the terms of the Act is ineffectual and void, and (e) that judgment should be entered in favor of the defendants as against the plaintiff, dismissing the

complaint with costs and disbursements (pp. 78-79 of Record).

POINT I.

The third proviso of the Act of Congress of February 4th, 1905 (33 Stat. at Large, 811, Chap. 778) is directory and not mandatory or jurisdictional.

The act being remedial in its character and for the benefit of materialmen, it should be liberally construed so as to effectuate the legislative intent.

The Court below had jurisdiction to proceed with the trial, where the date of completion and final settlement was February 19th, 1908, and the last of three weeks' public notice to creditors of their right to intervene was published November 25th, 1908, and for the following reasons:

The certificate as to jurisdiction herein, involves the construction of the Act of Congress of February 24th, 1905, 33 Stat., 811. The statute is as follows:

> "An Act for the Protection of Persons Furnishing Materials and Labor for the Construction of Public Works.
>
> "That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons

supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the Surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners.

"If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials, shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution:

"*Provided*, that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after performance and final settlement of said contract and not later:

"*And provided further*, that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract and not later. If the recovery on the bond should be inadequate to pay the amount found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into Court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit; the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability:

"*Provided further*, that in all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the Court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

Upon the trial before the Referee, the defendant surety company contended, and the Referee found, that the Court had no jurisdiction to try

the case for the reason that the creditors had not been notified as required by the third (last) proviso of the act (fol. 124 at p. 61, and fol. 126 at p. 62). The plaintiffs had, however, pursuant of statute, published a notice in the "New York Press" for twenty-one days, commencing November 5th, 1908, and ending November 25th, 1908 (pp. 28 and 59). The Referee, however, construed the "third proviso" of the act to mean that "any publication to satisfy the statute must be completed three months before Feb. 19, 1909, which is one year before the final settlement, *i. e.*, by the 19th day of November, 1908 (pp. 59-77 to 79).

The first proviso states that the materialman's suit "shall be commenced within one year after the performance and final settlement of said contract and *not later*." The legislative intent here expressed as to the time in which the action may be commenced, is plain and positive. Indeed, the negative words "and not later" emphasizes the definite legislative intent. It is no less obvious that provisos "first" and "third" are incongruous. The trouble arises in ascertaining the meaning of the last word of the act, "therefor." The Referee held that "the word 'therefor' must refer to the right of intervention." But such a conclusion leads to absurd results wholly incongruous with the plain language of the first proviso. This is obvious when one remembers that the creditors could not intervene until the action had been commenced and as the right to intervene is limited to "one year from the completion of the work and not later," it necessarily follows under such construction that the three weeks' publication to unknown creditors would have to be com-

pleted before the last three months of the year. This would reduce the time in which the action could be brought by materialmen to two months and one week after the first six months in which the United States alone can bring suit. Such reduction of time would destroy the substantive right so clearly and unequivocally granted by the first proviso. Surely we are not to conclude that Congress was of two minds at the time this act was passed. The presumption against inconsistency is one of the strongest presumptions known to the law. Furthermore, the first proviso treats solely and exclusively of the time in which the materialman shall commence his action. The Legislature evidently had only that one thought in mind in framing that provision. Should not that section, then, be regarded as controlling upon that subject in the absence of anything else in the act which squarely contradicts it? "When one section of a statute treats specially and solely of a matter, that section prevails in reference to that matter. However, under sections in which only incidental reference is made thereto, not because one section is more forceful as a legislative enactment than another, but because the legislative mind, having been in one section directed to this matter, must be presumed to have therein expressed its intention thereon, rather than in other sections where its attention was turned to other things" (Long *v.* Culp, 14 Kan., 412).

This third proviso, like the first, reflects a definite legislative purpose. It was framed to provide a reasonable notice and publicity for the benefit of creditors other than the plaintiff in an action brought under the act. It was obviously enacted not in the interest of the contractor and his bonds-

men, but solely in the interest of the materialmen who furnished work, labor or material to the contractor.

The title to this act indicates that it was enacted in the interest of materialmen and not in the interest of federal contractors and their bondsmen. It is remedial and should be so liberally construed as to effectuate the legislative intent.

"Where the first section of a statute conforms to the obvious legislative intent, it is not rendered inoperative by any later section which may appear inconsistent with that intent. In such case the later provision if not reconcilable should be regarded as nugatory" (State *v.* Bates, 96 Minn., 110; Hall *v.* State, 39 Fla., 637).

Congress clearly intended to give the last six months of the year next following completion and final settlement, in which a subcontractor or materialman might bring his action under the bond. Such an intent is frustrated by any construction of the obscure third proviso which would reduce this substantive right to the first two months and one week of that period.

Surely the third proviso was never intended to serve as a matter of defense under which a surety might escape liability for a breach of the plain conditions of his bond.

> "A later clause which is obscure and incoherent will not prevail over an earlier one which is clear and explicit" (Gudlich on Interpretation of Statutes, Section 183).
>
> "Nor, of course, if a reasonable operation can be given to the proviso, consistent with the principal object of the act, as gathered from its purview, can there be any question of a repeal of the latter by the former; and in con-

> struing statutes, the terms of a proviso may be limited by the general scope of the enacting clause to avoid repugnancy" (Gudlich on Interpretation of Statutes, Section 185).

Under the second proviso of the act a creditor may intervene in the action, any time "within one year from the completion of the work under said contract and not later." Now, if the defendants' and the Referee's construction of the statute is correct, to wit, that the third proviso reduces the time in which an action may be brought (in order to meet the requirements as to notice by publication) to two months and one week, then we are confronted with the anomalous result that diligence is discounted and a premium is placed on indolence, for the diligent creditor who begins the action is limited to two months and one week in which to get his copy of the contract from Washington (*vide* Act), and prepare and serve his pleadings, while the indolent creditor may have until the end of the "year from the completion of the work" in which to intervene. Surely, this could not have been the legislative intent.

But the incongruity between the provisos can be overcome by construing the troublesome third proviso as directory and not as mandatory.

Sutherland on Statutory Construction, at Vol. 1, page 1114, pertinently says:

> "There is no universal rule by which directory provisions may, under all circumstances, be distinguished from those which are mandatory. Where the provision is in affirmative words and there are no negative words, and it relates to the time or manner of doing the acts which constitute the chief purpose of the law, or those incidental or subsidiary thereto,

by an official person the provision has been usually treated as 'directory.' * * *

"Where a statute is affirmative, it does not necessarily imply that the mode or time mentioned in it is exclusive, and that the act provided for, if done at a different time or in a different manner will not have effect. Such is the literal implication, it is true; but since the latter may be modified to give effect to the intention, that implication is often prevented by another implication, namely, that the legislative intends what is reasonable, and especially that the act shall have effect; that its purpose shall not be thwarted by any trivial omission or a departure from it in some formal incidental or comparatively unimportant particular.

"It is the duty of the courts of justice to try and get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed (p. 1115). * * *

"The whole surroundings, the purposes of the enactment, the end to be accomplished, the consequences that may result from one meaning rather than another and the cardinal rule that seemingly incongruous provisions shall be made to harmonize rather than conflict, must all be considered in determining whether particular words shall have a mandatory or directory effect ascribed to them (p. 1116). * * *

"Provisions are directory where they relate to some immaterial matter not of the essence of the thing to be done; where a compliance is matter of convenience rather than substance; where the statutory departure will cause no injury to any person affected by it" (p. 1138).

In the light of the foregoing, let the Court note that the provisions found in the third proviso are affirmative and not negative in form, while the provisions of the first and second provisos are negative. Evidently the Legislature knew the import-

ance of the distinction. The time in which the materialman must bring his action is emphasized by the negative expression "and not later." The absence of any negative expression in the third proviso is therefore significant. The first and second proviso we made for the benefit of the surety and fixes the limit of time in which demands might be made upon him under the bond. Such requirements may properly be classed as mandatory and jurisdictional. The third proviso, however, was not for benefit of the surety, the compliance with its provisions tend rather to his disadvantage since it is calculated to increase the claims against him under the bond. Surely it was not in the legislative mind that such a proviso should inure to the advantage of the surety through any failure to comply with its requirements. The duty of publishing the notice was of a public character, and when the language of a statute creating such a duty is affirmative in character, it should be construed as directory. Therefore, even if the third proviso, with respect to the time of notice is not held to be invalid, the legislative intent can yet be preserved by holding it to be merely directory.

Statutes are not to be so literally construed as to defeat the purposes of the Legislature. A thing which is within the intention of the makers of the statute, is as much within the statute as if it were within the letter. (United States *v.* Freeman, 3 Howard, 556.)

> "The spirit as well as the letter of a statute must be respected, and where the whole context of a law demonstrates a particular intent in the Legislature to effect a certain object, some degree of implication may be called in to aid that intent" (Chief Justice

Marshall in Durousseau *v.* United States, 6 Cranch., 307).

A sixty days' extension of time of payment of a bill for materials was held not to relieve the surety of liability (U. S. Fidelity & G. Co. *v.* United States, 24 U. S., 142). The Court says: "If a person deliberately contracts for an uncertain liability he ought not to complain when that uncertainty becomes certain."

A variation of the contract which might relieve the bondsman from liability to the United States was held not to release from liability to laborers and materialmen (United States *v.* United States Fidelity & Guaranty Co., 151 Fed., 534). The same liberal construction which is applied to mechanics' lien laws should apply to this act (U. S. *v.* Burgdorf, 13 App. Div., C., 506). The act was not intended to enable sureties to escape liability through technicalities predicated upon abstruse provisions relating to the protection of materialmen, or predicated upon stipulations which they procured.

This act substitutes the bond in place and stead of the ordinary mechanics' lien which may be filed against other than Federal buildings, and as such should be most literally construed for the protection of materialmen.

In United States for the use of Hill *v.* American Surety Company, 200 U. S., 197, the surety company sought to limit the application of the statute to those furnishing material to the contractor, but not to such as were furnished to a sub-contractor invoking the rule *strictissimi juris*, but this Court, by Mr. Justice Day, said:

> "The rule *strictissimi juris* is a stringent one, and is liable at times to work a practical injustice. It is one which ought not be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the subcontractor, with a view of furthering the beneficent object of the statute."

The precise question which arises in the case at bar arose in Vermont Marble Co. *v.* National Surety Co. *et al.*, 213 Fed., 429 (Third Circuit), where it was *held*

> that the provision prescribing the time for publication of such notice is not intended to change the period of limitation within which the claims of subcontractors, etc., may be asserted in a suit on the bond, but that the provision is directory only, so that, where claims of subcontractors were asserted by intervention within the six months specified, it was immaterial that the notice was not published three months and three weeks prior to the expiration of the year within which suit might be instituted."

After commenting on the incongruity of the first and third provisos of the act the Court says (at p. 432):

> "The legislative intent to authorize any subcontractor * * * to institute a suit on the bond at any time within six months immediately preceding the expiration of one year from the completion of the contract, and authorizing any other creditor of like kind to intervene in such suit within the same period, is expressed as clearly as it is possible for

> language to express a legislative intent. * * * The act read as a whole clearly indicates the legislative purpose to protect subcontractors * * * on government work, and this intent gathered from the various provisions of the act itself, is as clearly confirmed in the title, which reads: 'An Act for the protection of persons furnishing materials and labor for the construction of public works.'"

After holding that the first and second provisos of the act are plainly "limitations upon the right of action * * * and jurisdictional," the Court adds:

> "They are obviously intended for the benefit of such sureties on the bond as are the defendants in the present case; while the last provision (the third proviso) of the statute, requiring notice to known creditors, and publication of notice of three months and three weeks prior to the expiration of the year within which suits are authorized to be brought, was just as obviously for the benefit of the creditors alone. * * * Plainly, then, the interest of these defendants was not to bring in other creditors, but, on the contrary, it was their interest to have the year expire without their having intervened. Yet under the contention of defendants, that this provision for notice and publication is mandatory and jurisdictional and not simply directory the anomalous result is reached, that the admittedly meritorious claim of this intervening creditor, asserted within the period prescribed by law and in a suit instituted within that period, must be defeated at the suggestion of the defendants, because a publication has not been made within the time limited therefor, the only object of such publication being to bring in other creditors who had not as yet intervened, and whose demands presumably would not otherwise be as-

> serted within the period limited therefor. Whatever may have been the intent of the Legislature as to this provision, it clearly was not to bring about a result so contradictory of the purposes of the act."

The Court goes on to argue, in substance, that any contention that would abridge the six months to two months and one week in which a materialman might bring his action

> "imputes to Congress an intention to abridge a substantative right conferred upon a meritorious class, by indirection and to conceal the purpose to do so, in a provision which, on its face, purported to be for the further advantage and benefit of that class. It is consistent with our respect for the legislative department, that we should not impute an intent to do indirectly what might better and more easily have been done directly, or by inconsistent provisions in the same statute, to accomplish a result by implication which contradicts the plainly expressed purpose of the act. The long established principles applicable to the construction and interpretation of statutes, require that we should seek to harmonize and not bring into conflict their various provisions. In this endeavor we are much aided in the present case by the obvious and clearly expressed purposes of the act itself * * * The first two (provisos) are necessarily limitations inherent in the right of action created by the act itself; the last upon which the defendants rely, not only fails to express any such limitations, but on its face was intended for the benefit of the class in whose favor such right of action was created, by asserting, so far as possible, opportunity to the members of that class, to assert their claims against the sureties of the contractor's bond, as provided for in the act. The general purpose of the act thus clearly

> recognized, is not to be obstructed or deprived of its efficiency by a subsidiary provision in the same act, which, though presumably intended to increase and not diminish the protection given to the class of persons described nevertheless, if construed as mandatory and jurisdictional, and not merely directory, seriously impairs the right conferred upon that class, and deprives persons furnishing materials and labor for the construction of public works, of the full measure of protection previously accorded them in the body of the act."

The Court then observes that the provision as to publication "is not an exception out of the general right accorded to persons for whose benefit the act was passed" but was a subsidiary provision entirely meant to be consistent with the general intent of the act and only by implication inconsistent therewith. That nothing is found therein which directly takes away from a creditor the right of bringing his suit or intervention at any time within the six months' period before the expiration of the year from completion of the contract. That if such right is taken away, the defendant surety insists, it is only by implication from the subsidiary requirements of making publication of notice three months and three weeks prior to the completion of the year, adding:

> "The books are full of instances where such subsidiary provisions have been so interpreted, as not to destroy or derogate from the right which it was the main purpose of the act to create. As said by Mr. Justice Field in the Circuit Court (Eureka Consolidated Mining Co. *v.* Richmond Mining Co. of Nevada, Fed. Case No. 4548, 4 Sawy., 302-316), 'Instances without number exist where the

meaning of words in a statute has been enlarged or restricted and qualified to carry out the intent of the Legislature. The inquiry, where uncertainty exists, always is as to what the Legislature intended, and when that is ascertained, it controls. In a recent case before the Supreme Court of the United States singing birds were held not to be live animals, within the meaning of a revenue act of Congress * * * And in a previous case arising upon the construction of the Oregon Donation Act of Congress, the term, a single man, was held to include in its meaning an unmarried woman.'"

The Court then refers to the case of Texas & Pacific Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S., 426, as illustrating by the judgment of the Supreme Court how far the Corut will go in its necessity and duty of effectuating in its integrity the legislative intent as gathered from a statute as a whole:

Quoting the third proviso:

"Provided further, that in all suits instituted under the provisions of this act, such personal notice of the pendency of such suits, informing them of their right to intervene as the Court shall order, shall be given to all known creditors, and in addition thereto, notice of publication in some newspaper * * * for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

The Court adds:

"The natural and grammatical antecedent of 'therefore' is 'the last publication,' which of course would be absurd. If, grammatically, it can be referred to 'suits instituted under the provisions of this act' then the last

publication is required to be at least three months before—not the *expiration* of the time limited therefor, but before—the *time* limited therefore; that is before the beginning of the period of six months within which the act authorized a suit to be brought. This then would refer to the period of six months after completion of the contract, within which suits in the bond could be brought only by the United States, but within which interventions could be made by the subcontract creditors. The words 'before the time limited therefor,' strictly construed, there, would mean, before the beginning of the time within which a suit could be brought by a subcontract creditor; that is, the beginning of the six months prior to the expiration of the year from the completion of the contract.

"These patent obscurities in the language of the proviso certainly add to the difficulty of construing the requirements of publication to be in any sense jurisdictional."

The Court evidently went to the trouble of investigating how that obscure proviso ever got into the act and pertinently adds:

"Moreover, referring to the legislative history of this proviso, we find that it was added in the committee having the bill in charge, and was reported to the House and adopted, and it is significant that there was no suggestion that the added provision directly or indirectly altered or was intended to alter, the important authority given in the original bill to subcontractors to bring their suits within twelve months from the completion of the contract. Under such circumstances, it is difficult to impute to Congress that it was intended, by the use of such ambiguous language, to take away in large part the protection which it was the avowed purpose of the act to give to this meritorious class of creditors.

"Construing these words as directory and not mandatory, or jurisdictional, we think the intent of the Legislature is subserved."

The case of Vermont Marble Company *v.* National Surety Co. *et al.*, 213 Fed., 429 (Third Circuit), *supra*, has been quoted at length as plaintiff's appeal rests largely upon the soundness of the argument set forth in the decision in that case.

As was said in that case, so in the case at bar the action was brought well within the year subsequent to the completion of the contract. Indeed, in the case at bar the plaintiff is only charged with running six days beyond the time fixed by their construction of the ambiguous statute. If the judgment below is affirmed it destroys the rights of a materialman which the Act of Congress in question plainly intended to protect, and such denial of right would be predicated on an inference arising out of the very obscurity and incongruity of a subsidiary proviso of said act which was intended for the materialman's benefit and his alone.

The defendant Surety Company is in the anomalous position of asserting the provisions of the act intended for the benefit of creditors like the plaintiff, in order to extinguish their own liability to such creditors upon the bond given for their protection.

POINT II.

The failure to obtain a Court order as to service by publication, under the Act, is not fatal to plaintiff's recovery, in view of the ambiguity of the statute upon the subject, and where the notice to all creditors of their right to intervene was published daily for three consecutive weeks in manner and form as done by plaintiff, and where the record fails of showing that any creditor was injured by any alleged defect as to time and manner of notice.

With reference to the failure of the plaintiffs to obtain any order of the Court in connection with the giving of notice, the plaintiffs submit that the provisions of the act do not cast any such duty on the plaintiff. Here, again, the meaning of the act is obscure as to whose duty it is to give the notice or as to whether it is absolutely required.

If the provision in the third proviso concerning the obtaining of a court order, be held to refer to notice to creditors, why cannot the provision be construed as vesting in the Court the discretion of determining who shall give the notice both personal and by publication? And would not the Court be most likely to select the defendants who alone know all the creditors? Would a laboring man be expected to know all creditors and bear the expense of publication and personal service? Would not such a construction make a farce of the statute?

The words "as the Court may order" grammatically construed, applies to the creditor's right to intervene. Furthermore, if it be held otherwise, the requirement of the notice is not absolute. The

second proviso certainly vests in any creditor the right to "file his claim in such action and be made a party thereto within one year from the completion of the work and not later," without any requirement as to obtaining any order of the Court. The language of the third proviso of the act is "as the Court may order." Even if this is held to refer to the matter of notice to creditors, still, the language is not mandatory. It is plainly permissive. It certainly does not cast upon the Court the duty to make any order in respect of notice, and this may be because it was contemplated that the Court might be satisfied that all of the creditors were present in Court uniting in the first action, and that notice by publication would be unnecessary, or it might be that the Court was satisfied that all of the creditors had waived such notice at the time such suit was brought and to incur the expense would be unnecessary. If, in fact, no notice were given and a considerable portion of the claimants, sleeping on their rights, had failed to intervene, it would hardly lie in the mouth of the defendant Surety Company to complain of this, or if, in fact, the notice was not given in time as contended for by the defendant surety, but, nevertheless, as in this case though tardy it was so effective as to bring in every one who might have an interest in, then the said defendant has no standing to claim that that was a mandatory jurisdictional requirement, which was never made for his benefit and the failure to comply with which deprived no one of any right. The record shows that all known creditors were personally served, that the action was commenced more than three months within the year after completion and final payment, and that the plaintiff gave notice by pub-

lication for three weeks (twenty-one consecutive days) ending November 25, 1908, which was only six days lacking the three months next preceding the end of the year after final settlement, and that three creditors intervened with all of whom the defendants settled. There is nothing in the record to show that any materialman suffered any loss excepting the plaintiff. Furthermore, the record shows that after the plaintiff had served all known creditors (fols. 46, 36) and had published for seventeen consecutive days the notice to unknown creditors, the defendants' attorneys signed a stipulation under which they obtained an extension to December 16, 1908, of time in which to move or plead, and expressly stipulated that "the defendants waive any failure on the part of plaintiff to notify creditors under the third proviso of the Statute, provided no more such notices are sent." The notice by publication continued thereafter until the full three weeks had been rounded out and for the reason that the stipulation on its face does not contemplate the stopping of the notice by publication. While the stipulation clearly estops the defendants from setting up any objection or alleged "failure of plaintiff to notify creditors under the third proviso of the Statute" the condition imposed on the plaintiff was that no more such notices are sent. The words "notify" and "sent" clearly cannot possibly refer to any notice by publication but refers only to the personal notice. And as to this, the plaintiffs had already notified all known creditors, nor does the record show that any creditor was overlooked. The inconsistent position of defendants in setting up the objection that plaintiff's agreement not to "send" further notices was an injustice against other creditors, is obvious

when we recall that they contend that the three weeks' published notice must have expired not later than November 19, 1908 (or three months before the expiration of the year after completion and final settlement). Now, the stipulation was dated two days after that date. If defendants' theory then be correct, the agreement wrought no harm against any creditor as it was entered into two days after the time in which any notice might properly be given under the act.

The act might be construed as casting upon the *surety* the duty of obtaining a court order and of notifying creditors. The last sentence of the act begins with the statement that "The surety on said bond may pay into Court," etc; and then follows the troublesome third proviso (which is separated from that which precedes only by a colon) which provides that "personal notice of the pending of such suits, informing them of their right to intervene as the Court may order, shall be given," etc. Grammatically construed, this would be susceptible of the construction that the surety should serve notice. And who would be in a better position to perfectly ascertain who all the materialmen are, than the surety on the bond who is in direct privity of contract with the contractor (the principal on the bond). Quaere: Must the United States notify creditors under the third proviso, where it brings an action in the first six months? The proviso says, "in *all* suits instituted under this act."

As between a laboring man and a surety should the statute be so construed as to cast the duty of expensive notice by publication on the laboring man. The cost might be prohibitive to a poor labor-

er or materialman, and so the purposes of the act would be defeated.

Further difficulty of construction is found by noting that the second proviso expressly provides that "any creditor may file his claim in such action and be made a party thereto within one year from the *completion* of the work (note that the language is not performance *and final settlement* as in the first proviso), under said contract and not later." Anomalous results follow upon a literal construction of the act when this distinction is made between the year following "completion" and the year following "performance and final settlement." The action must be commenced within one year after the latter event, while a creditor, under the second proviso may file his claim only within a year after the former event "completion." Let the Court note that no order of the Court is required by the second proviso. Now, it almost always happens that there is a considerable lapse of time between "completion" and "final settlement." In the Stitzer case (182 Fed., 513), four months elapsed between "completion" and "final settlement." Now, let the Court see how this would work out in the Stitzer case, had the question arose there.

Date of "completion" (Proviso 2) was March 25, 1909.

Date of "final settlement" (Proviso 1) was July 22, 1909.

The six months after "completion *and* final settlement" (Proviso 1) exclusively reserved for the United States to sue, would terminate January 22, 1910.

The earliest date therefore on which a creditor's

action could be brought would be January 22, 1910.

Now, under the construction of Proviso 3, given to it by the Court (Referee) below and the defendant surety, the first and last dates for publication for creditors would (at the very latest) be April 2 and 22, 1910.

But the "year from completion" (Proviso 2) expired March 24, 1910.

Now, we must assume, that the act intended to provide for timely publication of notice to creditors, but in the above concrete case the "year from completion" expired before the time in which the third proviso (under the Court's and defendant's construction) permits the notice by publication to be inserted. Such construction results in a *reductio ad absurdum*.

All of this difficulty is obviated in retaining inviolate the right of the creditor to sue or to intervene any time within the last six months next following the first six months reserved to the United States, and in treating the third proviso as only directory and not mandatory or jurisdictional, and as not being necessarily a condition prerequisite under any or all circumstances for the recovery of the claim of a materialman.

The defendant, Steam Fitting Company, threatened with involuntary bankruptcy (p. 53) had little to fear from the newspaper advertisement. It was the personal notice served upon its creditors which was most likely to precipitate bankruptcy proceedings. After the date of the stipulation no personal notices were "sent." But as of this date, the record shows that all known creditors had been personally served by the plaintiff and the notice of publication had but a few days to run. There is

nothing, therefore, in the record to show that notice was withheld from any known creditor. Indeed, the testimony shows quite the contrary. And even if there were, shall the defendants who induced the making of the stipulation, be now permitted to use it against the party at whose hands they sought it? Objection might possibly be raised by a creditor who could show himself to have sustained injury or loss, in which event the Court would doubtless afford equitable relief, but it certainly cannot be successfully raised by the defendants who not only cannot show that they are prejudiced thereby, but who were parties to the stipulation and whose pressing needs were its inducing cause and who expected to be benefited by it. To permit the defendants to profit by their own alleged wrong (they contend the stipulation was a "legal fraud" against creditors, p. 42) under the circumstances would be to place judicial sanction upon the requiting of the ministry of a merciful hand, with the deadly blow of a mailed fist. This is repugnant to every sense of justice and of equity.

Every difficulty is obviated by construing the third proviso as merely directory rather than jurisdictional and in holding that under the Act creditors may commence this action any time within the six months following the first six months reserved exclusively to the United States in which it may sue on the bond.

POINT III.

The stipulation (page 65) equitably estops the defendants from raising any objection as to the sufficiency of the notice required by Proviso Three of the Act. The time and circumstances under which the stipulation was made show that no injury or fraud was wrought against creditors by the making of the stipulation.

Defendants should not be permitted to assert provisions of the Act, intended for the benefit of creditors, in order to extinguish their own liability to such creditors upon the bond given for their benefit.

The stipulation was entered into at the request of, and for the supposed benefit of the defendants. It was signed by defendants' then attorneys, and was then, as now is, binding upon the parties. It is repugnant to the very spirit of equity that the defendants or either of them should be permitted to use the stipulation both as a sword and a shield. Shall the defendant who sought and obtained forbearance from the plaintiff, now be permitted to use that very act as the means of denying justice to the plaintiff, and to the defendants' enrichment? The fact that the defendants now have a new attorney is immaterial. The first attorneys were the *alter ego*, the agent of the defendants with full power to bind by stipulation, and especially so, where they supposed said stipulation would secure some benefit or advantage to their clients. The language of the stipulation is plain and comprehensive. It completely waives any defect in respect of notice, as required by Proviso Three of the act. Proviso Three requires notice both personal and by publi-

cation. Both are covered by the stipulation. And the condition "provided no more such notices be sent" clearly refers to personal notices, as published notices obviously are not "*sent*." The defendant, New York Steam Fitting Company, threatened with involuntary bankruptcy, had little to fear from the newspaper advertisement. It was the personal notice served on its creditors which were most likely to precipitate bankruptcy proceedings. After the date of the stipulation, November 21, 1908, no personal notices were sent. But no injustice was thereby wrought against other creditors, for, as of this date, the testimony shows that all known creditors had been personally served by the plaintiff and the notice of publication had but a few days to run. There is nothing therefore in the record to show that notice was withheld from any known creditor. Indeed, the testimony shows quite the contrary. And even if there were, shall the Surety Company that induced the making of the stipulation, be now permitted to use it against the party at whose hands they sought it? Objection might possibly be raised by a creditor who could show himself to have sustained injury or loss from the stipulation, in which event equitable relief would be afforded, but it certainly cannot be successfully raised by the Surety Company which not only cannot show that it was prejudiced thereby, but who was a party to the very stipulation and whose needs were its inducing cause and who sought to be benefited by it.

But the date as of which the stipulation was made, conclusively shows that no injury was or could have been suffered by any creditor if defendants' theory of construction of Proviso Third is correct. The date of the stipulation is November 21st,

1908. Under defendants' construction that the three weeks' notices to creditors must be published within the three months next following the first six months after "performance and final payment," the last possible date of publication would be November 19th, 1908. It follows, therefore, that a stipulation made, after the time had expired in which notice must be given, certainly works no injury or fraud against the persons to whom the notice should be given. Therefore no injury or fraud against creditors in respect of notice was possible under the construction urged by the defendants and held by the Referee. On the other hand, if the plaintiff's theory be correct, viz., that action may be commenced at any time within the year, then service by publication may at least be commenced contemporaneously with the commencement of the action and so carried beyond the year after "performance and final payment," then the advertisements were all timely inserted.

The defendants were in a position of superior advantage to prove that unsatisfied creditors had not been served, yet no such evidence was adduced at the trial.

And even if any injury had been sustained by a creditor by reason of the stipulation, can we say that the Surety Company who procured it for its own supposed advantage for use as a shield to avert bankruptcy, be now permitted to use it as a weapon of destruction against the plaintiff who mercifully granted the forbearance. Judicial sanction cannot be given to such conduct. In any event the equitable doctrine of estoppel operates to silence the defendants' objections to any alleged defect in the matter of service.

Upon the subject of equitable estoppel the Court

in Van Rensselaer *v.* Kearney, 11 Howard, at page 326, says:

> "The doctrine is founded, when properly applied, upon the highest principles of morality and recommends itself to the common-sense and justice of everyone. * * * It is a doctrine, therefore, when properly understood and applied, that concluded the truth, in order to prevent fraud and falsehood and imposes silence on a party only when in conscience and honesty he should not be allowed to speak."

The record shows that the Referee was careful to limit his characterization of the effect of the stipulation. He held:

> "That the stipulation * * * was ineffective and void *in so far* as it purports to relieve the use-plaintiff of its obligations to comply in the bringing and conduct of this action, with the terms of the act aforesaid" (p. 79).

But the Referee's conclusion of law was inconsistent with his fifteenth finding of fact (p. 77) in which he found that the last day on which notice could be given by the plaintiff was November 19th, 1908. Now, the date of the stipulation is November 21st, 1908, two days later than the plaintiff could notify any one, under the Referee's finding. And prior to that date the plaintiff had already personally served all known creditors.

If the entering into the stipulation worked any "legal fraud" as defendant's (present) attorney sets up (p. 42) the defendant surety company having inspired and procured the execution of the stipulation for their supposed advantage, cannot now take advantage thereof as a ground for avoid-

ing the consequence of the stipulation as between themselves and the plaintiff.

> Encyclopedia of United States Supreme Court Reports, Vol. 5, p. 590.
> Catts *v.* Whalen, 2 Howard, 376.
> U. S. *v.* Girault, 11 Howard, 22, 30.
> Shutte *v.* Thompson, 15 Wall., 151.
> Mutual Life Ins. Co. *v.* Hill, 193 U. S., 551-560.
> Carey *v.* Brown, 92 U. S., 171.
> Fackler *v.* Ford, 24 Howard, 322.
> Randon *v.* Toby, 11 Howard, 493-518.

It is repugnant to all sense of justice and of equity that the surety should, upon the stipulation, now predicate an avoidance of liability to the plaintiff.

> "The principle of equitable estoppel is, that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he will not in a Court of justice be permitted to avail himself of that advantage." Encyclopedia of U. S. Sup. Ct. Reports, Vol. 5, p. 938, citing Insurance Co. *v.* Wilkinson, 13 Wallace, 222, 233; Dair *v.* U. S., 16 Wall.

To illustrate the great lengths to which the Federal Courts go in applying this equitable doctrine of estoppel, attention is directed to the case of Dickerson *v.* Colegrove, 100 U. S., 78. In this case one B was the owner of an undivided half of certain real property. His sister who owned the other moiety sold the fee to one D who at the time knew nothing of B. Upon the grantee learning of

B and B's learning of his sister's act, the latter wrote a letter to his sister telling her that she might tell D he need not fear anything from him. He added "You can claim all there is. This letter will be enough for him, etc." Under these circumstances the letter was held to work as an estoppel *in pais* precluding B from setting up any claim to the property and that one F to whom B subsequently conveyed his moiety was not a *bona fide* purchaser and that his title was subject to the legal and equitable rights of D and those claiming under the latter:

The unanimous Court, at page 580, says:

> "The estoppel here relied upon is known as an equitable estoppel *in pais*. The law upon this subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man and is not permitted to go beyond this limit."

Applying the doctrine of equitable estoppel as thus defined, it is respectfully submitted that the defendant sureties are by the terms of their stipulation equitably estopped from objecting to the alleged insufficiency of the notice given by the plaintiff.

CONCLUSION.

Plaintiff respectfully submits that the jurisdictional question certified to this Court as to "whether under these circumstances the defendant surety company's motion to dismiss the complaint for want of jurisdiction should have been granted" should be answered in the negative, and that the cause should be remanded to the District Court for a new trial consistent with the decision of this Court.

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Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 67.

UNITED STATES OF AMERICA for the use and benefit of ALEXANDER BRYANT COMPANY,
Plaintiff-in-Error,

against

NEW YORK STEAMFITTING COMPANY
Defendant,

and the

TITLE GUARANTY AND SURETY COMPANY,
Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT-IN-ERROR.

ADRIAN T. KIERNAN,
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Stillman Appellate Printing Co., 51 Broad St., N. Y.

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Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 67.

UNITED STATES OF AMERICA for the use and benefit of Alexander Bryant Company,
Plaintiff-in-Error,

against

NEW YORK STEAMFITTING COMPANY,
Defendant,

And the TITLE GUARANTY AND SURETY COMPANY,
Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Statement.

The facts in this case are sufficiently recited in the Brief of the plaintiff-in-error. The Statute under consideration is printed therein at pages

13-15 and will not be repeated here. The main question presented has been decided in the plaintiff's favor by the Circuit Court of Appeals in the Third Circuit (VERMONT MARBLE CO. v. NATIONAL SURETY CO., 213 Fed. Rep. 429) and in defendant's favor in the District Court in the same Circuit (U. S. v. STANNARD, 206 Fed. Rep. 326). The opinions in these cases present the opposing views of the proper construction of the Statute.

FIRST POINT.

Compliance with the requirements of the third Proviso of the Act is a limitation upon the liability to the plaintiff.

In the VERMONT MARBLE CO. case (*supra*) it is conceded that "the limitation incorporated in the right to sue as conferred by the Act, upon those furnishing labor and material to the contractor, that such suit or intervention must be instituted within one year from the completion of the contract and the provision that only one suit can be brought, in which all other creditors may intervene, are limitations upon the right of action conferred by the Statute, and are jurisdictional" (p. 433).

These are contained in the Act in the first two of the concluding paragraphs which are expressed in the form of provisos. The third paragraph is likewise in form a proviso. There is nothing in its form of expression to distinguish its relation

to the main subject from that of the others. But the Circuit Court found that it was no limitation upon the right of action and that as a mere directory provision, an ignoring of its requirements might be negligible.

At about the time that the decision was being made, this Court had the question of the interpretation of the same Act before it in the case of TEXAS CEMENT CO. v. MCCORD, 233 U. S. 157. In that case the action had been brought before six months had expired. The relation of the limitations to the right of action are thus defined:

> "By this Statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before and is the creature of the Statute. The Act does not place a limitation upon a cause of action theretofore existing, but creates a new one upon the terms named in the Statute. The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The Statute thus created a new liability and gives a special remedy for it and upon well settled principles the limitations upon such liability become a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself" (p. 162).

There is no real ambiguity about the meaning of the third Proviso. Its subject is notice to cred-

itors to exercise their right to intervene. In the preceding provisions the time to intervene is limited to one year after completion. No one who was not seeking to misunderstand could seemingly be in any doubt that three months before the time limited for intervention is nine months after completion. There is no question as to what the Statute says but only as to what effect is to be given to a disregard of its plain directions.

If the result of holding that the directions of the Third Proviso are mandatory, is to limit the time for bringing a creditor's action to eight months and a week after the completion of the contract, there is nothing oppressive in such a provision nor is any inference to be drawn against its being intended on that account. This Act furnishes a substitute for the system of Mechanics' Liens under State laws. Diligence is always required by such Acts. For illustration under the NEW YORK LIEN LAW a party filing a lien for work or materials furnished towards a public improvement has to begin his action within three months (section 18) and must file his notice of claim to a lien within thirty days after completion of the contract (section 12).

> 3 BIRDSEYE'S CONSOLIDATED LAWS, pp. 3174 and 3175.

Before any action can be brought under the Federal Act in question the contract must be completed. This means that all claims for work and materials furnished have then matured. For six months after the creditor's claim has become due he has time to prepare to enforce it against the surety. A further period of over two months

within any part of which he may bring suit, certainly furnishes a reasonable opportunity to proceed without undue haste.

In the VERMONT MARBLE CO. case (*supra*) it is said that the Legislative intent is made plain beyond all cavil, to authorize a suit to be brought up to the last day before the expiration of one year from the completion of the contract (p. 432). Such a result can be obtained only by reading the first Proviso disassociated from the rest of the context. And if that is done, it authorizes the bringing of such a suit the first day after the completion of the contract just as certainly as on the last day of the year.

It is the apparent incongruity between the first and third Provisos that has led to different views of the interpretation of this Act. In the VERMONT MARBLE CO. case, the trouble is laid to the supposed ambiguity or incongruity of the third Proviso. The real difficulty is with the first Proviso. This Proviso contains the superfluous provisions. If it were stricken out entirely, it would not subtract a single feature from the Act. The time before which the action could not be commenced is already covered by the preceding provision that it cannot be commenced until after six months have expired since the completion of the contract. Thus the proviso that such an action shall not be commenced until after the completion of the contract is a useless and inaccurate repetition of an idea already correctly and specifically expressed in the Act. In the third Proviso it is clearly provided that the suit must be begun at least three months and three weeks before the expiration of the year. The provision in the first

Proviso that it must be brought within the year is a further useless and inaccurate statement of an idea definitely and expressly covered by the third Proviso. If the suit had to be brought *before* the termination of the year, there is no use of saying that it has to be brought within the year just as there is no use of saying that it cannot be brought until *after* completion, when it cannot be brought until six months has elapsed after completion. But because these useless statements are incorporated in the Act, there is no reason for trying to make them serve a purpose at the expense of destroying the specific provisions of the Act.

The only way to construe this Act so as to harmonize all its provisions is to accept the statements of the first Proviso as literally correct and not to give them an extended meaning. Thus the statement that a creditors' action *must* be brought within the period between the completion of the contract and one year thereafter is not inconsistent with the other provisions for when it *may* be brought within that period. To go further and call its declarations an authorization for bringing a suit at any time within the year makes it as repugnant to the preceding provision that such an action shall not be commenced within the first six months as to the following provision that it must be commenced more than three months before the expiration of the year.

In each instance in which the period of one year from the completion of the contract is mentioned in the Act it is the obvious intention to make clear and reiterate the idea that that shall be the final period beyond which no claim shall be asserted against the bond. This is not the equivalent of

a provision that any act, such as the bringing of the suit as well as securing an intervention, may be initiated at any time within the year.

The Court will take judicial notice that the proceedings to secure an intervention cannot be conducted in a day. It is the obvious intention of the Act to afford to general creditors an interval of three months within which to secure an intervention. Under the construction placed upon the Act by the Court in the VERMONT MARBLE Co. case, that an action may be commenced on the last day of the year, all opportunity for intervention may be precluded.

There is no confusion of practice possible under the Act as literally construed; that arises only when the plain provisions are attempted to be construed out of their meaning.

The Act requires that some creditor shall be sufficiently vigilant to commence an action at some time about eight months after the contract is completed. The difference between eight and twelve months is not enough to raise any question of reasonableness. One is longer than the other, but both are amply liberal. The bringing of the action by a creditor extends the time of the other creditors to assert their claims by intervention until the end of the year. It may be said that this gives a greater latitude to creditors who have not brought an action than to the creditor who initiates the action. But the provision that but one action shall be brought might defeat the right of other creditors to assert their claims if some reasonable interval was not afforded them to intervene in the action whose initiation forestalls them from bringing suit themselves. And no doubt

the Legislature had in mind that there would be creditors who had an equitable claim to share in the protection of the bond but who might not feel justified in incurring the trouble and expense of bringing an action and undertaking its carriage.

The construction of this Act by the Court in the VERMONT MARBLE Co. case practically nullifies the third Proviso. If an action can be commenced as late as the last day of the year there is no way of complying with its provisions. Obviously in an action so brought no notice can be published whose last publication shall be at least three months before the expiration of the year. It is not suggested that the absolute prohibition against intervention after a year has elapsed contained in the second Proviso is negatived by anything else contained in the Act. How then can other creditors be notified, by personal notice or publication, of their right to intervene after the right has expired by limitation?

The principal argument against the natural construction of the effect of this Act is that the third Proviso is intended for the benefit of the creditors and not of the surety and that it cannot avail itself of a non-compliance with its terms to defeat the claim of the plaintiff.

It is obvious that the Legislature intended that this part of the Act should be complied with. It secured such compliance by making such a Proviso and thereby engrafting it as a limitation upon the right of action. If a compliance with its provisions is to have no effect upon the right of the plaintiff to collect its claim from the surety, how, it may be asked, is any plaintiff to be expected to be held to a compliance? If the plaintiff does

comply, he invites other creditors to come in and perhaps reduce, proportionately, his own recovery. If he does not comply, he gets the possible advantage of keeping out the other creditors. It is safe to say that if the view of the Circuit Court of Appeals in the VERMONT MARBLE Co. case should be adopted by this Court, no creditor hereafter bringing an action will take the trouble and expense of giving notice to any other creditor and run the risk of adding to the claims against the bond. The third Proviso will become a dead letter. If its provisions are no limitation upon the plaintiff's right of action, no Court has yet suggested how they are to be made workable.

The surety is not prejudiced by having a creditor bring a suit before the six months have expired. If that time expires before the trial and the Government has brought no action on the bond, the surety is in no worse position than it would be if the action had been commenced later. In a recent case the Surety was allowed to present that objection and prevail, not because it was prejudiced but because the limitation was engrafted on the right of action. It was because the plaintiff did not make out a cause of action in failing to show that six months had elapsed before the commencement of the action and not because this was a defense to the surety that the action was dismissed.

TEXAS CEMENT Co. v. MCCORD, 233 U. S. 157.

The provision that the creditor's action shall be brought in the Circuit Court in the District in which the contract was to be performed is not for the protection of the surety but obviously for

the convenience of the other creditors. But the surety is allowed to raise the objection.

U. S. v. CONGRESS CONSTR'N CO., 222 U. S. 199.

If the third Proviso is a limitation upon the plaintiff's right of action and it fails to show a compliance with its terms, it is available to the surety to make the objection that no cause of action has been established. There is no privity between the creditor and the surety except as it is created by the Statute. If the plaintiff has not established a right to sue in accordance with the provisions of the Act, it has no cause of action against the Surety upon the bond which was not made to the Creditor. The question presented is as to the existence of a cause of action, not of a defense, and so is available to any defendant however situated.

SECOND POINT.

The stipulation (p. 65) did not give existence to a cause of action where there was none under the Act.

The further point to be considered is the effect of a stipulation made by the attorneys (Record, p. 65). It is not clear just what was intended by this stipulation. It seems to have been made in connection with an extension of time to answer. Apparently it had reference to giving personal notice to the creditors. The plaintiff had given personal notice to all those known to it (pp. 36-38), but had obtained no order as to how such notice should be given as provided in the Act.

Apparently the defendant agreed to waive any objection to the failure to give such notice if the plaintiff did not give any further notice. It may be that this stipulation precluded the defendant from raising an objection as to the sufficiency of the plaintiff's method of giving such notice. It is not necessary to determine this. The objection upon which the defendant stands is that this action was not commenced until November 2, 1908, which was only three months and seventeen days before the expiration of the year and that under the provisions of the third Proviso of the Act the period for commencing the action in time to publish the required notice for three weeks before the expiration of nine months from completion of the contract had expired before the action was commenced. Under the construction of this Act urged by the defendant, no notice to creditors could be given in an action so commenced, that would not be a nullity so far as the plaintiff was concerned. The three months before the expiration of the year upon which the last publication had to be made (Nov. 19) had already been passed when the stipulation was made (Nov. 21). The stipulation had obvious reference to the giving of further notices which should be "sent" and none to the publication of the notice. And this was the understanding of the plaintiff because it kept on publishing the notice on November 22, 23, 24 and 25 (p. 30) although the stipulation provided that no more notices should be sent.

If the stipulation should be given a more enlarged significance the Referee was unquestionably right in holding that it was void as against public policy. If it was the intention of the par-

ties to make an agreement that the other creditors who were intended to have an opportunity to intervene in the action, were to be kept in ignorance of the pendency of the action for the joint benefit of the plaintiff and the surety, such a conspiracy to defeat the purposes of the Act cannot be upheld as lawful. It is the plaintiff who is urging the stipulation in its own behalf. If it had an illegal purpose the plaintiff participated in it equally with the defendant and is equally bound by its invalidity. There is no question of estoppel. The commencement of the action too late and the insufficient publication of the notice had already occurred before the stipulation was made and could not be said to have been induced by it. The defendant does not urge as a defence any action or omission of the plaintiff that was in any way based on the stipulation.

It would be a serious matter if the Court should sanction the right of the creditor and the surety to enter into a stipulation that the requirements of the third Proviso as to giving notice to other creditors might be waived. Obviously that agreement would be made in every such action because both the creditor and surety are interested in shutting out other creditors and limiting the claims against the bond. It would be but a way of repealing the provisions of the Act and making the requirement of notice a dead letter.

It is not supposable that these attorneys intended by the stipulation to illegally evade the requirements of the Statute and the wording of the Stipulation does not require that it should be so construed. But if they did, without appreciation of the significance of their action, the plaintiff is not in a position to set up its own illegal action in its own behalf.

THIRD POINT.

The motion to dismiss the writ of error should be granted.

When the Record was printed the defendant moved to dismiss the writ on the ground that the jurisdiction of the District Court was not in issue in the sense of Section 238 of the JUDICIAL CODE of March 31, 1911, c. 231.

The motion was submitted on written briefs on April 13, 1914. On the following April 27th, the motion was postponed for further argument in connection with the hearing on the merits.

The question presented by this appeal is whether a compliance with the requirements of the third Proviso is an essential factor to establishing the existence of a cause of action in plaintiff's favor. It is true that this is sometimes denominated by the Courts a jurisdictional matter and that in the case at bar it is so referred to by the Referee and by counsel. But the characterization by Court or counsel cannot affect the fact or prevent this Court from examining whether a question of jurisdiction in its proper sense is involved, for "this Court takes notice of its own jurisdiction and whether the question is raised by the counsel or not, inquires of its own motion whether there is jurisdiction to entertain any given case before it."

FORE RIVER SHIPBUILDING CO. v. HAGG
219 U. S. 175, p. 177.

The defendants were brought in as parties by the service of a summons (p. 3) and the notice

that the plaintiff failed to properly publish had no relation to acquiring jurisdiction over them.

The subject of the action was the alleged liability of the defendants to the plaintiff upon the bond in suit.

The surety answered, setting up no plea to the jurisdiction of the Court, but raising an issue as to whether the provisions of the Act had been complied with so as to enable the plaintiff to recover (Record, pp. 21-3). The trial of the action was referred and resulted in a non-suit at the end of the plaintiff's case for failure of proof (p. 63). This ruling was proper as no evidence had been admitted that the plaintiff had furnished any labor or materials. The plaintiff had, however, tendered such proof and it was excluded as immaterial on the ground that the evidence showed that the plaintiff had not complied with the requirement of the statute that notice to creditors should be published at least three months before the expiration of the year after acceptance of the public work (pp. 62-3).

Upon this record the plaintiff obtained a certificate that a question of jurisdiction is involved (p. 92) and took out a writ of error from this Court instead of appealing to the Circuit Court of Appeals.

There was no controversy in this case as to whether the District Court had power to hear and determine the cause. It was not disputed that the action was properly brought in the right court and district or that jurisdiction of the subject of the action was expressly conferred on this particular Court by the statute or that jurisdiction of the parties was duly acquired.

The ruling of the Referee that compliance with the statutory requirements as to giving notice to

other creditors was an essential element of the plaintiff's cause of action did not involve any question of jurisdiction. It was just such a question as to the right to recovery as general courts have to pass on in any form of action, as, for instance, in an action for foreclosure of a mechanic's lien, whether the notice of lien complied with the statute or necessary notices have been given or orders made to create or preserve the lien or whether a Statute of Limitations bars the right of recovery. Such decisions may turn a plaintiff out of court, but the denial of a right to grant relief upon the facts is not a denial of jurisdiction to entertain the action.

Even if this Court should find that the Referee was wrong in holding that a compliance with the third Proviso is a limitation upon the liability to the plaintiff, the error would be in a ruling upon an incidental question of substance, and not of jurisdiction, which should have been reviewed by the Circuit Court of Appeals. The same is true of the Referee's ruling in relation to the effect of the stipulation (p. 79).

The writ of error should be dismissed as no question as to the jurisdiction of the Court below to hear and determine the action is presented by the record.

FOURTH POINT.

The writ of error should be dismissed or the judgment should be affirmed.

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